

*United States Court of Appeals
for the
District of Columbia Circuit*



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BRIEF FOR PETITIONER AND JOINT APPENDIX

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 18, 237

DISTRICT OF COLUMBIA,

Petitioner,

v.

NORWOOD STUDIOS, INC.,

Respondent

707

**BRIEF FOR PETITIONER
AND JOINT APPENDIX**

ON PETITION FOR REVIEW OF A DECISION
OF THE DISTRICT OF COLUMBIA TAX COURT

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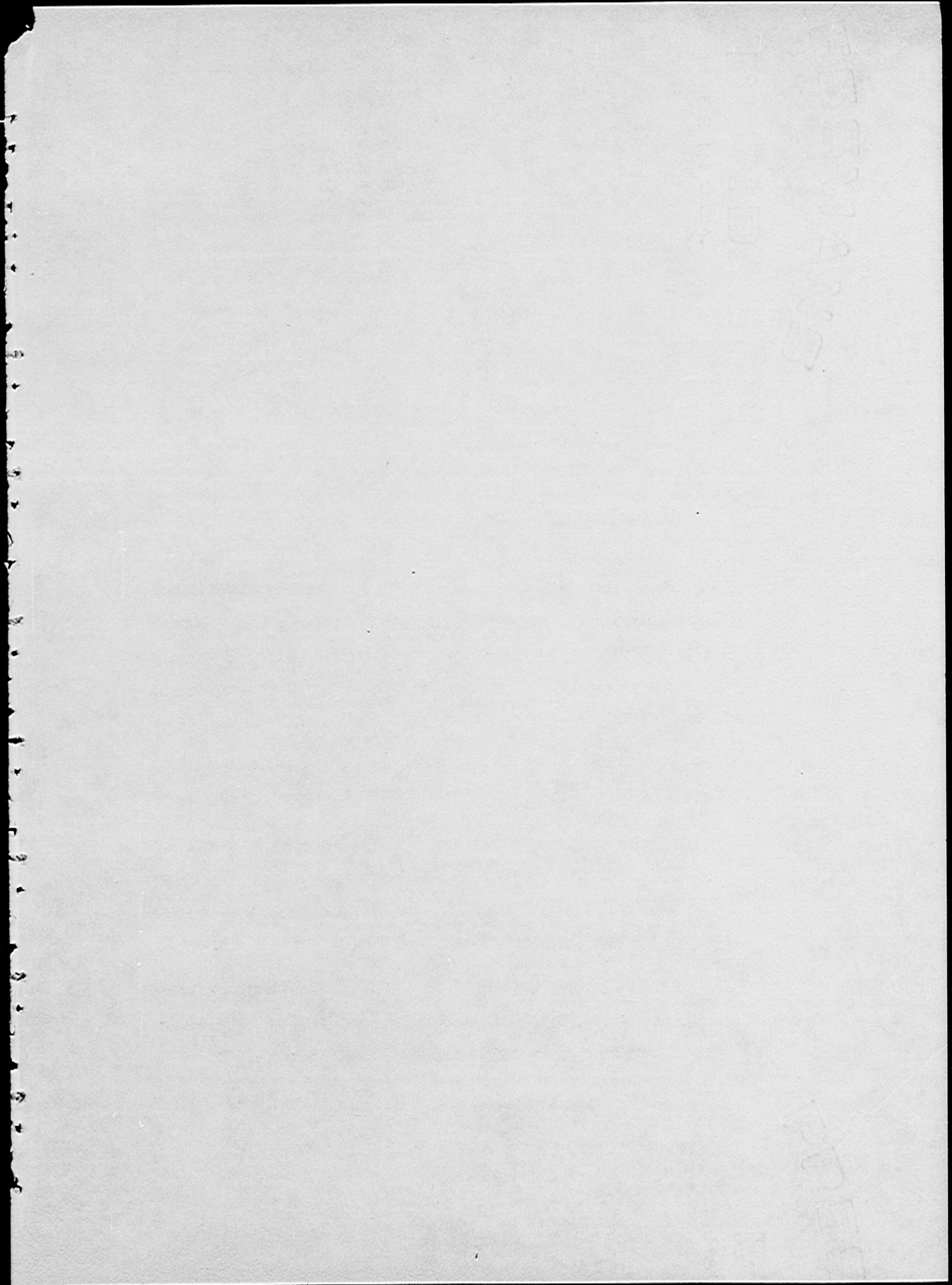
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United States Court of Appeals
for the District of Columbia Circuit

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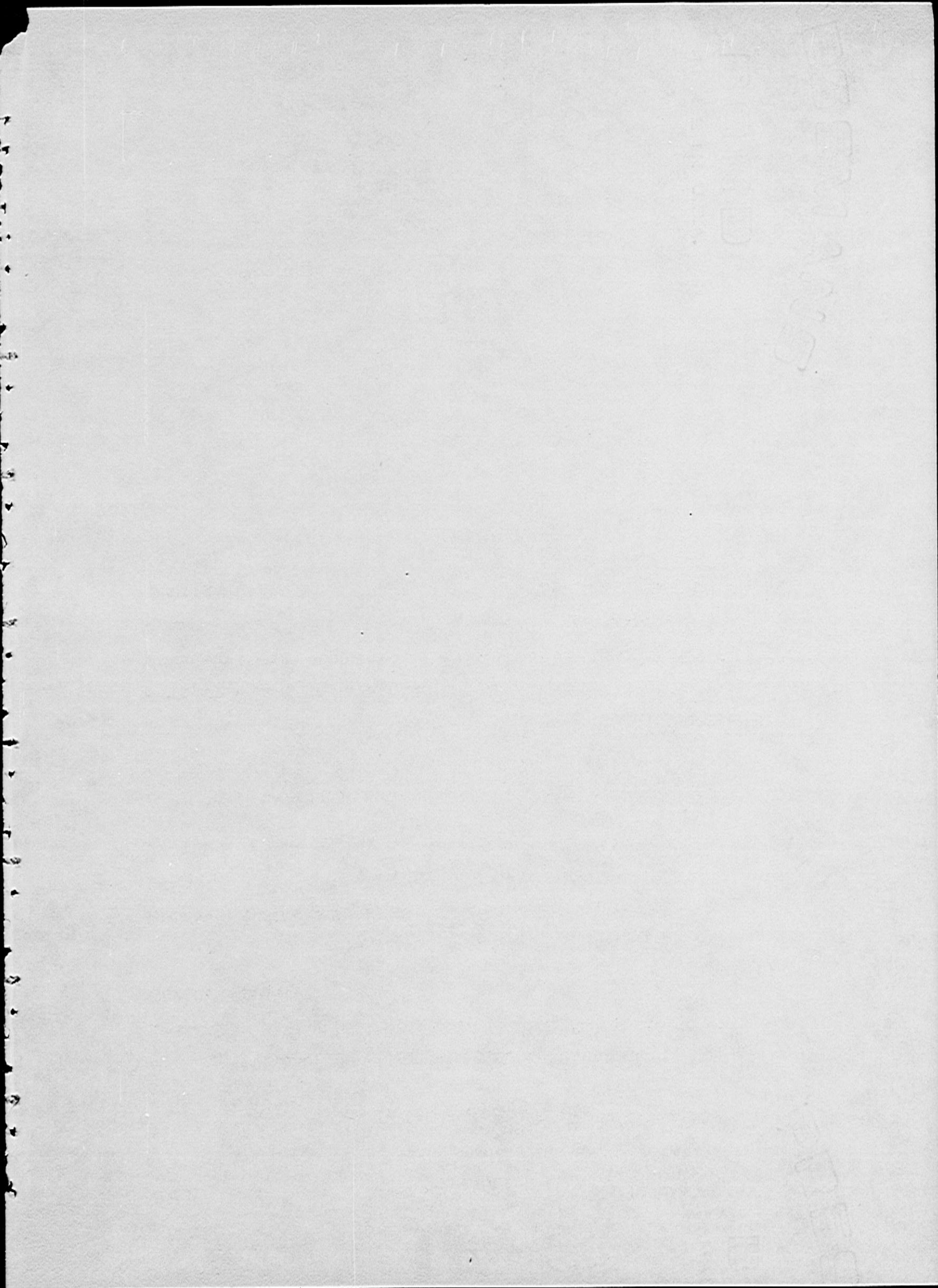
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QUESTIONS PRESENTED

Where Norwood Studios, Inc., a corporation regularly engaged in the production of motion picture films, produced for the AFL-CIO, under written contracts, a series of motion pictures for television release, employing for that purpose its own employees as well as a number of subcontractors, and where the Tax Court concluded that the activities of Norwood, for District sales tax purposes, constituted "personal service transactions" which involved "sales as inconsequential elements," the questions presented are:

1. Were not the films produced by Norwood Studios for AFL-CIO subject to sales tax for the reason that they constituted a "retail sale" or "sale at retail" of tangible personal property produced for a consideration under contract, and not "personal service transactions which involve sales as inconsequential elements for which no separate charges are made"?
2. Were not the facts (detailed hereinafter) which the District, in an appropriate motion requested the Tax Court to find, and which the Tax Court declined to do, dispositive of the question whether the transactions between Norwood and the AFL-CIO were subject to District sales tax?



INDEX
Subject Index

	<u>PAGE</u>
Questions Presented	Frontispiece
Jurisdictional Statement	1
Statement of the Case	2
Statement of Points	8
Summary of Argument	9
 Argument:	
I The Tax Court's Refusal To Revise And Amplify Its Findings of Fact In Accordance With The District's Motion Was Clearly Erroneous.....	10
II The Transactions Involved Herein Were Not Personal Service Transactions And Are Therefore Taxable As Retail Sales.....	13
III The Transactions Herein Did Not Involve "Sales As Inconsequential Elements For Which No Separate Charges Are Made."	17
Conclusion	22
 CASES CITED	
Burke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 363 S. W. 2d 392	15
Campana Corp. v. Harrison (C. C. A. 7, 1940), 114 F. 2d 400	13
District of Columbia v. Ghent, 95 U. S. App. D. C. 103, 220 F. 2d 210	16
District of Columbia v. Pace, 320 U. S. 698, 64 S. Ct. 406, 88 L. Ed. 408	12

<u>District of Columbia v. Washington Post Co.,</u> 98 U.S.App.D.C. 304, 235 F.2d 531	16
<u>Dollar v. Land</u> , 87 U.S.App.D.C. 214, 184 F.2d 245, cert. denied, 340 U.S. 884	13
<u>Fritz v. Peck</u> , 160 Ohio St. 90, 113 N.E.2d 627	20
<u>Glushak v. City of New York</u> , 178 N.Y.S.2d 33, 6 A.D. 2d 381	21
<u>Green v. Sgurvovsky (Fla.)</u> , 133 So.2d 663	20
<u>Hale v. State Board of Assessment</u> , 302 U.S. 95, 58 S.Ct. 102	16
<u>Hebrew Home for the Aged v. District of Columbia</u> , 79 U.S.App.D.C. 64, 142 F.2d 573	16
<u>Long v. Roberts & Son</u> , 234 Ala. 570, 176 So. 213	20
<u>Lucas v. Gross Motor Car Co.</u> , 32 Ohio App. 183, 161 N.E. 362	15
<u>People v. Glazer</u> , 138 Cal.App.2d 274, 291 P.2d 957	20
<u>People ex rel. Walker Engraving Corp. v. Graves</u> , 243 App.Div. 652, 276 N.Y.S. 674, aff'd without opinion, 268 N.Y. 648, 198 N.E. 539	20
<u>Saverio v. Carson</u> , 186 Tenn. 166, 208 S.W.2d 1018	20
<u>State Tax Comm. v. Hopkins</u> , 234 Ala. 556, 176 So. 210	20
<u>Van Zandt v. Fort Worth Press (Tex.)</u> , 359 S.W.2d 893	13, 15
<u>Washington Chapter, etc. v. District of Columbia</u> , 92 U.S.App.D.C. 139, 203 F.2d 68	16
<u>Washington Times-Herald v. District of Columbia</u> , 94 U.S.App.D.C. 154, 213 F.2d 23	16

STATUTES CITED

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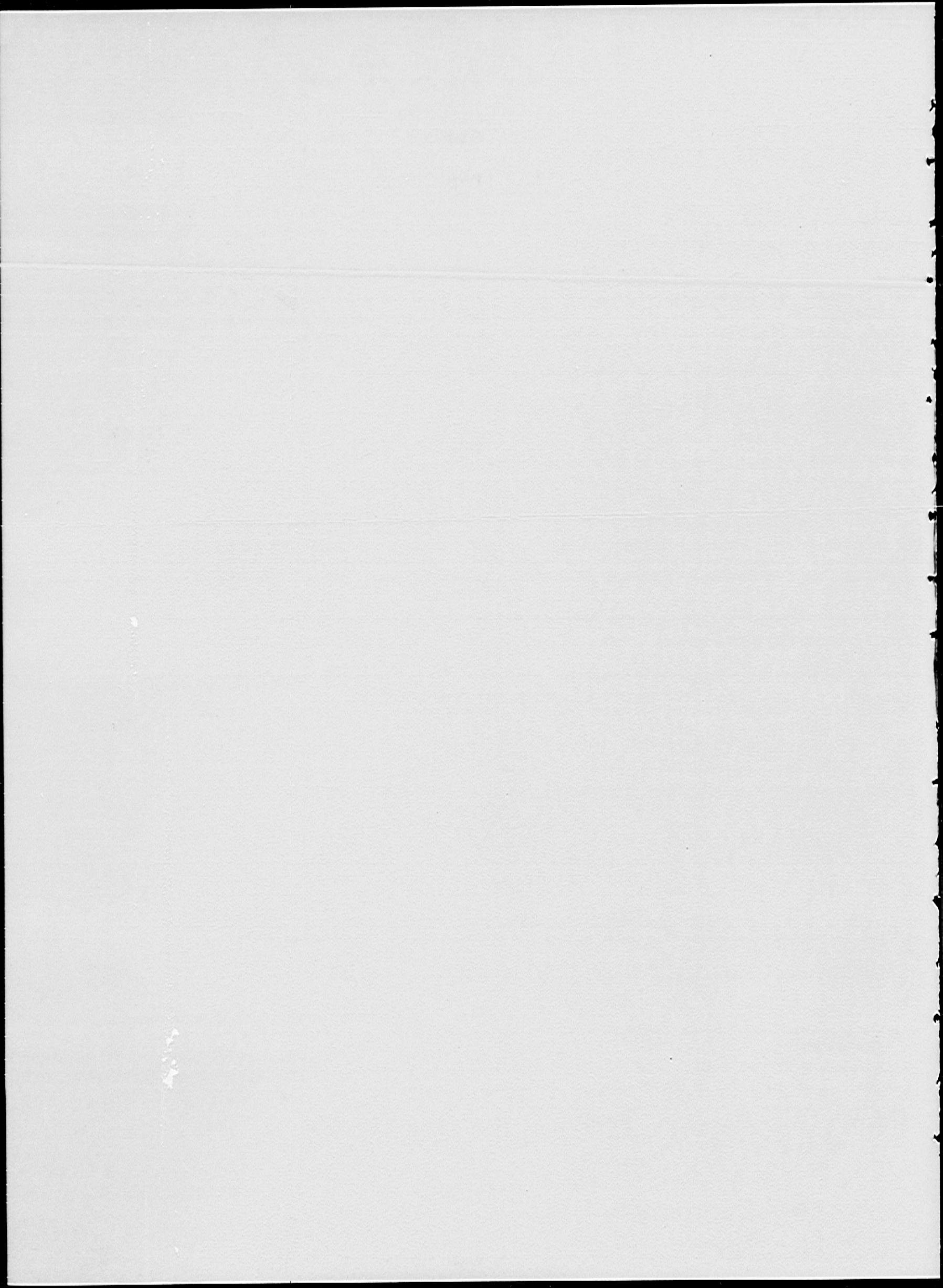
Section 47-2601-14 (a)	6, 15
Section 47-2601-14 (b)	6, 7, 8, 13, 17
Section 47-2601-16 (a)	7, 17
Section 47-2602 (Supp. II-1963)	13

D. C. Sales and Use Tax Regulations:

Section 202	7, 8, 17, 18
Section 1210-.....	7, 19

MISCELLANEOUS AUTHORITIES CITED

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Commerce Clearing House State Tax Reporter, Wisconsin, Vol. 1, ¶ 60-149	19
Commerce Clearing House State Tax Reporter, Pennsylvania, Vol. 2, ¶ 64-231	19



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,)
Petitioner,) No. 18, 237
v.)
NORWOOD STUDIOS, INC.,)
Respondent.)

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This is an appeal from a decision of the District of Columbia Tax Court filed August 1, 1963, cancelling sales tax assessments against respondent, Norwood Studios, Inc., for the period June 1, 1958, through January 31, 1961, in the amount of \$14,714.92 (J.A. 123). The District's motion to revise the findings of fact, to vacate the decision in favor of respondent herein and for entry of decision in favor of petitioner herein, filed with the Tax Court on September 3, 1963, was with minor exceptions, denied on September 11, 1963 (J.A. 132-134). A petition for review of the Tax Court's decision was filed by the District of Columbia on October 10, 1963 (J.A. 135-136).

This Court has jurisdiction to review decisions of the District of Columbia Tax Court in sales tax cases pursuant to Section 141 of the

District of Columbia Revenue Act of 1949, 63 Stat. 120, ch. 146 (§47-2618, D.C. Code, 1961), and Sections 3 and 4, Title IX of the Act of August 17, 1937, 50 Stat. 673, ch. 690, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223; and as amended by Section 3 of the Act of July 10, 1952, 66 Stat. 544, ch. 649 (§47-2403 and §47-2404, D.C. Code, 1961).

STATEMENT OF THE CASE

Respondent, Norwood Studios, Inc., a corporation with its principal office at 926 New Jersey Avenue, N.W., Washington, D.C., produced for the American Federation of Labor and the Congress of Industrial Organizations, hereafter referred to as AFL-CIO, a series of motion pictures for television release (J.A. 11-12, 82-83). The title, job-number, agreement date, and contract price of the series were:

<u>TITLE</u>	<u>JOB NO.</u>	<u>AGREEMENT DATE</u>	<u>CONTRACT PRICE</u>
Your Community (also referred to as It's Good Business) - 1 show.	N-143	June 5, 1958	\$ 35,322.00
Labor Parade (also referred to as Americans at Work) - 39 shows.	N-211	July 16, 1958	\$235,241.00
Americans at Work - 13 shows.	N-211 Supp.	July 6, 1959	\$ 78,413.66
Americans at Work - 52 shows.	N-320	Nov. 24, 1959	\$383,552.00

(J.A. 83-86, 94-110, 113-122)

Other transactions between respondent and the AFL-CIO were:

<u>DESCRIPTION</u>	<u>JOB NO.</u>	<u>PRICE</u>
Extra prints	N-211	\$ 1,176.30
Photo coverage - Mr. George Meany	N-215	\$ 606.10
TV Spot - Mr. George Meany	N-221	\$ 1,430.13
totaled - - - - -		\$735,741.19
		(J.A. 84-86)

Pursuant to the prime contracts, respondent produced for the AFL-CIO one hundred and five (105), 13 1/2 minute, 16 mm, black and white sound motion picture shows, covering one hundred and five (105) subjects, as specified by the AFL-CIO (J.A. 12-13, 83-84). The final product supplied to the AFL-CIO, under the terms of each contract, was a number of release prints of each film produced, which prints were distributed, for showing, to television stations throughout the United States (J.A. 85, 94-110, 113-122).

Included among the personnel required for the production of each film were writers, producers, directors, cameramen, soundmen, film editors, sound cutters, projectionists, narrators, electricians and carpenters (J.A. 13-14, 36-37, 82). The Tax Court denied petitioner's motion to revise the findings of fact to reflect that twenty-five to thirty of

respondent's employees, and fifty or more employees of subcontractors of respondent were required during various stages of production (J.A. 124-125, 132-133). There were forty-four unions whose members were involved in work done by respondent (J.A. 124-125, 132-133).

Respondent had no laboratory facilities for developing and processing film. This work was done by a subcontractor, Capital Film Laboratories, Inc., hereafter called Capital Film (J.A. 18, 25-26, 86-87). Capital Film received exposed but undeveloped film from respondent and the film was developed into a negative. The negative was then printed by Capital Film on positive film and this was the "work print". After the "work print" had been cut, corrected, and otherwise arranged, the "answer print" or "first trial print" was produced by Capital Film. After the "answer print" had been studied by respondent's staff and there had been consultation with representatives of the AFL-CIO, Capital Film produced the "release prints". These were the prints which were subsequently sent to television stations and moving picture theatres throughout the United States (J.A. 86-87).

The length of the "work print" was six to fifteen times the length of the "release print" (J.A. 18). The "answer print", as distinguished from the "work print" and the "release print" was

" * * * a positive print, which after the negative has been matched and the sound track has been put to it, you then use this print to judge as to whether the optical effects are in the right place. That is the fades and dissolves and whether the sound is synchronized properly and whether the negative has been cut properly, the timing and whether the density of the scenes is correct. It is almost equivalent to what you would call a printer's proof * * *. "

(J.A. 16)

Invoices introduced at trial revealed that respondent paid Capital Film \$62,165.50 for developing and processing costs and film requirements in connection with contract N-211 and \$54,009.46 for developing and processing costs and film requirements in connection with contract N-320. These totals do not include charges made for sales taxes previously paid and cab fares required (J.A. 79-80). Petitioner's motion to revise the findings of fact to reflect the facts as stated in this and the previous paragraph was denied by the Tax Court. (J.A. 124-126, 132-134.)

The Tax Court found that the raw or blank film used in making the "release prints", which were distributed for the AFL-CIO to stations throughout the United States, did not cost in excess of \$30,000 (J.A. 87). This cost figure does not include the cost of raw or blank film used in producing the 'work prints' or the 'answer prints'.

The Tax Court concluded that the transactions herein were personal service transactions which involved sales as inconsequential elements for which no separate charges were made and that, pursuant to

Section 47-2601-14 (b) (3) of the Code, they were therefore exempt from sales taxes.

Petitioner's motion to revise the findings of fact, to vacate the decision in favor of respondent, and for entry of decision in favor of petitioner was, with minor exceptions, denied and this appeal followed.

**STATUTES, AND REGULATIONS PROMULGATED BY THE
COMMISSIONERS OF THE DISTRICT OF COLUMBIA, INVOLVED**

Section 47-2601-14 (a):

"' Retail sale' and 'sale at retail' mean the sale in any quantity or quantities of any tangible personal property or service taxable under the terms of this chapter. * * * For the purpose of the tax imposed by this chapter, these terms shall include but shall not be limited to the following:

*

*

*

"(2) Any production, fabrication, or printing of tangible personal property on special order for a consideration."

Section 47-2601-14 (b):

"The term 'retail sale' and 'sale at retail' shall not include the following:

*

*

*

"(3) Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made."

Section 47-2601-16 (a):

" 'Sales price' means the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

- (1) The cost of the property sold.
- (2) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.
- (3) The cost of transportation of the property prior to its sale at retail. The total amount of the sales price includes all of the following: a. Any services that are a part of the sale. b. Any amount for which credit is given to the purchaser by the vendor. "

Section 202 (b), D. C. Sales and Use Tax Regulations:

" 'INCONSEQUENTIAL ELEMENTS'. The act exempts from the tax the gross receipts from professional, insurance, or personal service transactions which involve sales of tangible personal property as inconsequential elements and where no separate charges for such sales of tangible personal property are made. The phrase 'sales as inconsequential elements' shall be deemed to include any sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the sales price of the tangible personal property is less than 10 % of the amount charged for the services rendered in the transaction. "

Section 1210, D. C. Sales and Use Tax Regulations:

"(a) Photographers, photo-finishers and photostat producers are engaged both in the sale of tangible personal property and in rendering services for others. When such persons develop and print pictures and sell films, frames, cameras, completed photographs, photostats, blue prints, etc., they are making a sale of a completed article of tangible personal property in every such case and they shall collect the tax on the total selling price without

deduction for the cost of the property sold, labor, service or any other expense whatsoever. Persons engaged in the processing of color films and who, in addition, mount such films in frames, etc., are considered to be engaged in the sale of tangible personal property and shall collect the tax on the total charge or selling price. When persons covered by this section render services such as retouching and tinting or coloring of photographs belonging to others, or developing film without producing finished prints therefrom, they are rendering services and need not collect the tax from their customers.

"(b) The sale of pictures produced by artists, including but not limited to those produced in the following media, are taxable sales: Oil, charcoal, pen and ink, pencil, water colors, pastels, tempera, etc. The services performed by an artist in cleaning, repairing or restoring pictures as described in this subsection, are not taxable sales."

STATEMENT OF POINTS

1. The District of Columbia Tax Court erred in concluding that the transactions in question were "personal service transactions" within the purview of Section 47-2601-14 (b) (3), D. C. Code, 1961.
2. The District of Columbia Tax Court erred in concluding that the transactions in question involved "sales as inconsequential elements for which no separate charge was made" as required by Section 47-2601-14 (b) (3), D. C. Code, 1961, and Section 202 (b), D. C. Sales and Use Tax Regulations.
3. The District of Columbia Tax Court erred in failing to grant, in its entirety, the District's motion to revise findings of fact, to vacate decision in favor of Norwood Studios, Inc., and for entry of decision in favor of the District filed on September 3, 1963.

4. The District of Columbia Tax Court erred in concluding that sales taxes assessed against respondent by petitioner for the period June 1, 1958, through January 31, 1961, were, in the amounts set forth in the decision of the Court, erroneously assessed against and collected from respondent and that respondent is entitled to a refund thereof with interest.

SUMMARY OF ARGUMENT

Respondent, Norwood Studios, Inc., produced for the AFL-CIO, under contract, a series of motion pictures for television release. The production of each film required numerous personnel and subcontractors of respondent. The transactions involved were not "personal service transactions" under the District of Columbia Sales Tax Act. The Tax Court's finding to the contrary was clearly erroneous.

The Tax Court's finding that the films produced by Norwood for the AFL-CIO involved sales as inconsequential elements was also erroneous. Respondent, under the contracts, made sales of completed articles of tangible personal property, and the total consideration paid to Norwood by the AFL-CIO was subject to the sales tax without deduction for the cost of the materials used or property sold, labor, service or any other expense.

ARGUMENT

I

The Tax Court's Refusal To Revise And Amplify Its
Findings of Fact In Accordance With The District's Motion
Was Clearly Erroneous.

After the Tax Court had issued its Findings of Fact, Opinion, and Decision, the District filed a timely motion for a revision of the Court's findings, the vacating of its decision in favor of Norwood, and the entry of a decision in favor of the District. The District's motion was, with minor exceptions, denied by the Tax Court (J.A. 132-134).

Petitioner moved the Tax Court to amplify Finding of Fact No. 2 (b) by adding a sentence at the beginning to read as follows:

"The production of films by petitioner for the American Federation of Labor and Congress of Industrial Organizations, (AFL-CIO), under contracts hereinafter described, required for each film the utilization of twenty-five to thirty company employees and, during various stages of production, fifty or more employees of subcontractors of petitioner." (J.A. 125.)

and Finding of Fact No. 2 (c) by adding two sentences at the end to read as follows:

"Numerous people with varying skills and aptitudes are required. There are forty-four different unions whose members are involved in work done by petitioner." (J.A. 125.)

The uncontroverted testimony of respondent's witness, Philip Martin, Jr., established these facts (J.A. 34-37.) This evidence shows, in greater detail, the nature and extent of the transactions involved and should have

been included in the Tax Court's original findings. It is submitted that, based upon these additional findings, as clearly established by the evidence, the Tax Court was required to conclude that the transactions were not "personal service transactions".

In addition, the District moved the Tax Court to revise Finding of Fact No. 7(a) to read as follows:

"Petitioner had no laboratory facilities for developing and processing film. Capital Film Laboratories, Inc., as a subcontractor of Petitioner, did this work. Capital Film received exposed but undeveloped film from petitioner. This film was developed, becoming a negative. It was then printed on positive film which was used as a 'work print' for the purposes of editing and cutting. The length of the work print was 6 to 15 times the length of the release print. Capital Film also turned out an 'answer print' or 'first trial print'. This was:

' . . . a positive print, which after the negative has been matched and the sound track has been put to it, you then use this print to judge as to whether the optical effects are in the right place. That is the fades and dissolves and whether the sound is synchronized properly and whether the negative has been cut properly, the timing and whether the density of the scenes is correct. It is almost equivalent to what you would call a printer's proof. . . '

This print was reviewed by the petitioner, the AFL-CIO, and the appropriate reviewing personnel of Capital Film. Corrections were then made and, when finally accepted by the AFL-CIO, the release prints were produced.

"Petitioner paid Capital Film Laboratories \$62,165.50 for developing and processing and for film supplied in connection with contract N-211 and \$54,009.46 for developing and processing and for film supplied in connection with contract N-320. These totals do not include charges made for sales taxes previously paid and cab fare required therein." (J.A. 126.)

The uncontroverted evidence in this case, clearly established by the testimony of respondent's witnesses and a stipulation between the parties, outlined, as stated in the District's motion, the nature and extent of the work done by Capital Film Laboratories, Inc. It showed that respondent paid Capital Film \$116,174.96 for work done and film supplied under the two prime contracts. This amount itself is more than 10 % of the total contract prices (J.A. 16-20, 25-26, 79-80). Based on this evidence, the Tax Court could not have concluded that the contracts involved sales of personal property as inconsequential elements, and the Tax Court's Findings of Fact should have been revised accordingly.

The other revisions requested were that Findings of Fact 2 (d), 8 (a), and 8 (d) be deleted or revised to indicate that the transactions were not personal service transactions and did not involve sales as inconsequential elements (J.A. 127). Based on the evidence, these findings were not valid conclusions.

The uncontroverted facts which the District moved the Tax Court to find were essential to a proper disposition of this case. The Supreme Court of the United States in District of Columbia v. Pace, 320 U.S. 698, 703, 88 L.Ed. 408, 64 S.Ct. 406, said of the power of review by this Court of decisions of the District of Columbia Tax Court:

"We conclude, therefore, that the Court of Appeals has power to review decisions of the Board of Tax Appeals as under the equity practice in which the whole case, both facts and law, is open for consideration in the appellate court, subject to the long-standing rule that findings of fact are treated as presumptively correct and are accepted unless clearly wrong. * * *."

See also Dollar v. Land, 87 U. S. App. D. C. 214, 184 F.2d 245, cert. denied 340 U. S. 884 (1950); Campana Corp. v. Harrison (C. C. A. 7, 1940), 114 F.2d 400.

II

The Transactions Involved Herein Were Not Personal Service Transactions And Are Therefore Taxable As Retail Sales.

Section 47-2602, D. C. Code, 1961 (Supp. II-1963), imposes a three per cent gross receipts tax on the "privilege of selling certain tangible personal property at retail sale and for the privilege of selling certain selected services defined as sales at retail * * *". Section 47-2601-14 (b) (3), D. C. Code, 1961, specifically excludes from the definition of "retail sale" and "sale at retail", "Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made".

The transactions involved herein were not, as respondent contends, and the Tax Court found, personal service transactions. In Van Zandt v. Fort Worth Press, 359 S. W. 2d 893, 895-896 (Tex. 1962), the court, in determining what constituted personal services within the meaning of a statute authorizing recovery of attorney fees by persons having valid claims

for services rendered, discussed the words "personal services" as distinguished from the word "services":

"Webster's Third New International Dictionary gives a general definition of 'service' as 'action or use that furthers some end or purpose: conduct or performance that assists or benefits someone or something: deeds useful or instrumental toward some object.' The same source defines 'personal services' thusly: 'economic service involving the either intellectual or manual personal labor of the server rather than a salable product of his skill (physicians, architects, and garbage collectors equally sell personal services).' In construing the state's Unemployment Compensation Act the Supreme Court of Utah had occasion in *Creameries of America v. Industrial Commission*, 98 Utah 571, 102 P. 2d 300, 304, to differentiate 'services' and 'personal services'. The court said:

'In ordinary usage the term "services" has a rather broad and general meaning. It includes generally any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed. The general definition of "service" as given in Webster's New International Dictionary is "performance of labor for the benefit of another"; "Act or instance of helping, or benefiting". The term "personal service" indicates that the "act" done for the benefit of another is done personally by a particular individual.'

(Emphasis supplied.)

The Appellate Department, Superior Court, Los Angeles County, California, had occasion to distinguish 'services' and 'personal services' in *Levitt v. Faber*, 20 Cal. App. 2d Supp. 758, 64 P. 2d 498, 500, and did so in these words:

' "Services" and "personal services" are not definitely coextensive. Within the meaning of statutes such as that now under consideration and of exemption statutes, "services" may be rendered through the actual labor be performed by one's employees and by means of his machinery or other equipment, but "personal services" are those performed by the individual himself.''" (Emphasis supplied.)

See also Burke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 363 S.W. 2d 392 (1962); Lucas v. Gross Motor Car Co., 32 Ohio App. 183, 161 N.E. 362 (1927).

Respondent, pursuant to the prime contracts, produced for the AFL-CIO a series of motion picture shows for television and motion picture showing. The actual product purchased was a number of release prints of each film. Included among the numerous personnel required for the production of each show were writers, producers, directors, cameramen, soundmen, film editors, sound cutters, projectionists, narrators, electricians and carpenters. Twenty-five to thirty of respondent's employees, and fifty or more employees of subcontractors of respondent, were required during various stages of production. There were forty-four unions whose members were involved in work done by respondent. In addition, Capital Film, as a subcontractor of respondent, developed and processed the film utilized under the contracts. The transactions herein involved were not personal service transactions, i.e., services performed personally by a particular individual or particular individuals. In essence, respondent was engaged in a "production * * * of tangible personal property on special order for a consideration", as specified by Section 47-2601-14 (a) (2), D.C. Code, 1961.

In the Van Zandt and Burke cases cited above, the words "personal services" were strictly construed. It is one of the basic rules of tax law

that exemptions from taxation are strictly construed against those claiming the exemption. Hale v. State Board of Assessment, 302 U. S. 95, 58 S. Ct. 102 (1937); Washington Chapter, Etc. v. District of Columbia, 92 U. S. App. D. C. 139, 203 F. 2d 68 (1953); Hebrew Home for the Aged v. District of Columbia, 79 U. S. App. D. C. 64, 142 F. 2d 573 (1944).

This case is readily distinguishable from the cases of Washington-Times-Herald v. District of Columbia, 94 U. S. App. D. C. 154, 213 F. 2d 23 (1954), and District of Columbia v. Washington Post Company, 98 U. S. App. D. C. 304, 235 F. 2d 531 (1956). In the Washington Times-Herald case the Court said:

" * * * The syndicates sold to the Times-Herald the right to reproduce one time the work of artists who make the drawings. They simply sold the professional and personal services of the artists whom they had under contract * * *. The price was paid for the artists' work, * * *. The newspaper bought the creation of the artist * * *. " (Emphasis supplied.)

The transactions there involved were held by this Court to be personal service transactions on the ground that they called for the personal services of a particular individual or particular individuals, i. e., of a particular artist or artists. Here, however, the services of numerous unidentified personnel were requisite for the production of the films and the release prints for AFL-CIO. Cf. District of Columbia v. Ghent, 95 U. S. App. D. C. 103, 220 F. 2d 210 (1955).

III

The Transactions Herein Did Not Involve "Sales As Inconsequential Elements For Which No Separate Charges Are Made."

Assuming, arguendo, that the transactions herein were "personal service transactions", nevertheless, they were not exempt from tax under Section 47-2601-14 (b) (3) since they did not involve "sales as inconsequential elements for which no separate charges are made". Section 202 (b), D. C. Sales and Use Tax Regulations, defines "sales as inconsequential elements" as including

" * * * any sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the sales price of the tangible personal property is less than 10 % of the amount charged for the services rendered in the transaction."

"Sales price" is defined, in part, by Section 47-2601-16 (a), D. C. Code, 1961, as follows:

" * * * the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

- (1) The cost of the property sold.
- (2) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.
- (3) The cost of transportation of the property prior to its sale at retail. The total amount of the sales price includes all of the following: a. Any services that are a part of the sale. b. Any amount for which credit is given to the purchaser by the vendor."

The Tax Court found that the "value" or "cost" of the film used in the contracts was not in excess of \$30,000. This figure represents solely the market cost of raw stock (unexposed and undeveloped film) at one cent a foot, not including discounts for cash payment, multiplied by the total footage of film supplied to the AFL-CIO as the final prints, called "release prints", required under the contracts. This cost figure is without reference to any other film used or consumed by Norwood in the production of the final prints or any of the costs involved in obtaining those prints, such as processing and developing costs. But Section 202 (b) does not speak of "value" or "cost" but rather of "sales price" and the "cost" of materials used is only one of numerous elements which is determinative of "sales price". "Value" is irrelevant as it is not included in the definition.

Invoices introduced into evidence before the Tax Court revealed that respondent paid Capital Film Laboratories, Inc., \$62,165.50 for work done and materials supplied to Norwood under contract N-211 and \$54,009.46 for work done and materials supplied under contract N-320. Assuming that "cost" represents "value" and that "value" rather than "sales price" is the criterion for determining "inconsequential elements", then, at the very least, the "value" of the release prints would be the total "cost" of producing them. Here, laboratory costs alone aggregated \$116,174.96 without regard to other costs and this amount is far in excess

of 10 % of the total contract prices. Actually, however, there is no direct evidence, whatsoever, in this case of total "cost" or "value" of the items supplied to AFL-CIO under its contracts with Norwood.

Section 1210, D. C. Sales and Use Tax Regulations, pertaining to photographers, artists, and the like, states:

"(a) Photographers, photo-finishers and photostat producers are engaged both in the sale of tangible personal property and in rendering services for others. When such persons develop and print pictures and sell films, frames, cameras, completed photographs, photostats, blue prints, etc., they are making a sale of a completed article of tangible personal property in every such case and they shall collect the tax on the total selling price without deduction for the cost of the property sold, labor, service or any other expense whatsoever. Persons engaged in the processing of color films and who, in addition, mount such films in frames, etc., are considered to be engaged in the sale of tangible personal property and shall collect the tax on the total charge or selling price. When persons covered by this section render services such as retouching and tinting or coloring of photographs belonging to others, or developing film without producing finished prints therefrom, they are rendering services and need not collect the tax from their customers.

"(b) The sale of pictures produced by artists, including but not limited to those produced in the following media, are taxable sales: Oil, charcoal, pen and ink, pencil, water colors, pastels, tempera, etc. The services performed by an artist in cleaning, repairing or restoring pictures as described in this subsection, are not taxable sales."

For similar provisions, see CCH-State Tax Reporter, Maryland, ¶ 60-019f; CCH-State Tax Reporter, Wisconsin, ¶ 60-149; CCH-State Tax Reporter, Pennsylvania, ¶ 64-231. Respondent, under its

contracts, made sales of completed articles of tangible personal property, and the total consideration for the transactions was subject to sales taxes without deduction for the cost of the property sold, labor, service or any other expenses.

Typical cases finding activities to be taxable sales and not non-taxable services have involved a diaper service, Saverio v. Carson, 186 Tenn. 166, 208 S. W. 2d 1018 (1948); a dental laboratory making dentures for dentists, Fritz v. Peck, 160 Ohio St. 90, 113 N. E. 2d 627 (1953); a manufacturer of eyeglasses to order, State Tax Comm. v. Hopkins, 234 Ala. 556, 176 So. 210 (1937); printing, lithographing, and engraving, Long v. Roberts & Son, 234 Ala. 570, 176 So. 213 (1937); making X-ray films and retaining title, People v. Glazer, 138 Cal. App. 2d 274, 291 P. 2d 957 (1956); etching printing plates with the intrinsic value only two per cent of the price, People ex rel. Walker Engraving Corp. v. Graves, 243 App. Div. 652, 276 N. Y. S. 674, affd. without opinion 268 N. Y. 648, 198 N. E. 539 (1935).

The case of Green v. Sgurvosky (Fla. 1961), 133 So. 2d 663, involved the services of an independent contractor, who contracted with architects, builders, and advertising agencies, for the production of bristol board renderings. The Court said, at page 667:

"There remains for consideration the question of whether the exemption as to professional services provided by § 212.08 (8) (b) includes the items involved here. The statute there exempts 'professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made.' Unquestionably personal services of the artist or craftsman furnish or bring about the main value of the product. But it is the product which is sold, and the renderer's services without the product would not be of any value to the architect. The sale can not be said to be 'inconsequential.' It is comparable to an artist's preparation and sale of a portrait to a customer. The customer buys the resultant portrait. It is the product which represents the value, after the services have been performed which bring it into being."

In a similar case in New York, Glushak v. City of New York, 178 N.Y.S.2d 33, 36, 6 A.D.2d 381 (1958), involving the services of a renderer, the Court stated:

"Hillman Periodicals v. Gerosa, 285 App. Div. 441, 137 N.Y.S.2d 863, affirmed 308 N.Y. 982, 127 N.E.2d 842, is decisive of the issues herein. There the sales tax was applied to commercial illustrators who contracted to draw illustrations for books and transferred the final drawings to their customers. In that case, this Court, holding that artists who transfer their pictures to their customers are engaged in making sales, said in 285 App. Div. at page 442, 137 N.Y.S.2d at page 864, 'The artists, who were the vendors under their contracts with petitioner, "vested" all rights in petitioner, "assigned all right, title and interest" in the material to petitioner and clearly retained no rights whatsoever in the finished products.' Emphasizing that the skill and services required to make the drawings could not be separated therefrom for sales tax treatment, this Court further stated in 285 App. Div. at page 442, 137 N.Y.S.2d at page 864: 'Here there was an integration of the services rendered into tangible personal properties which were sold irrevocably to petitioner.' "

CONCLUSION

It is respectfully submitted that the decision of the District of Columbia Tax Court was incorrect and should be reversed.

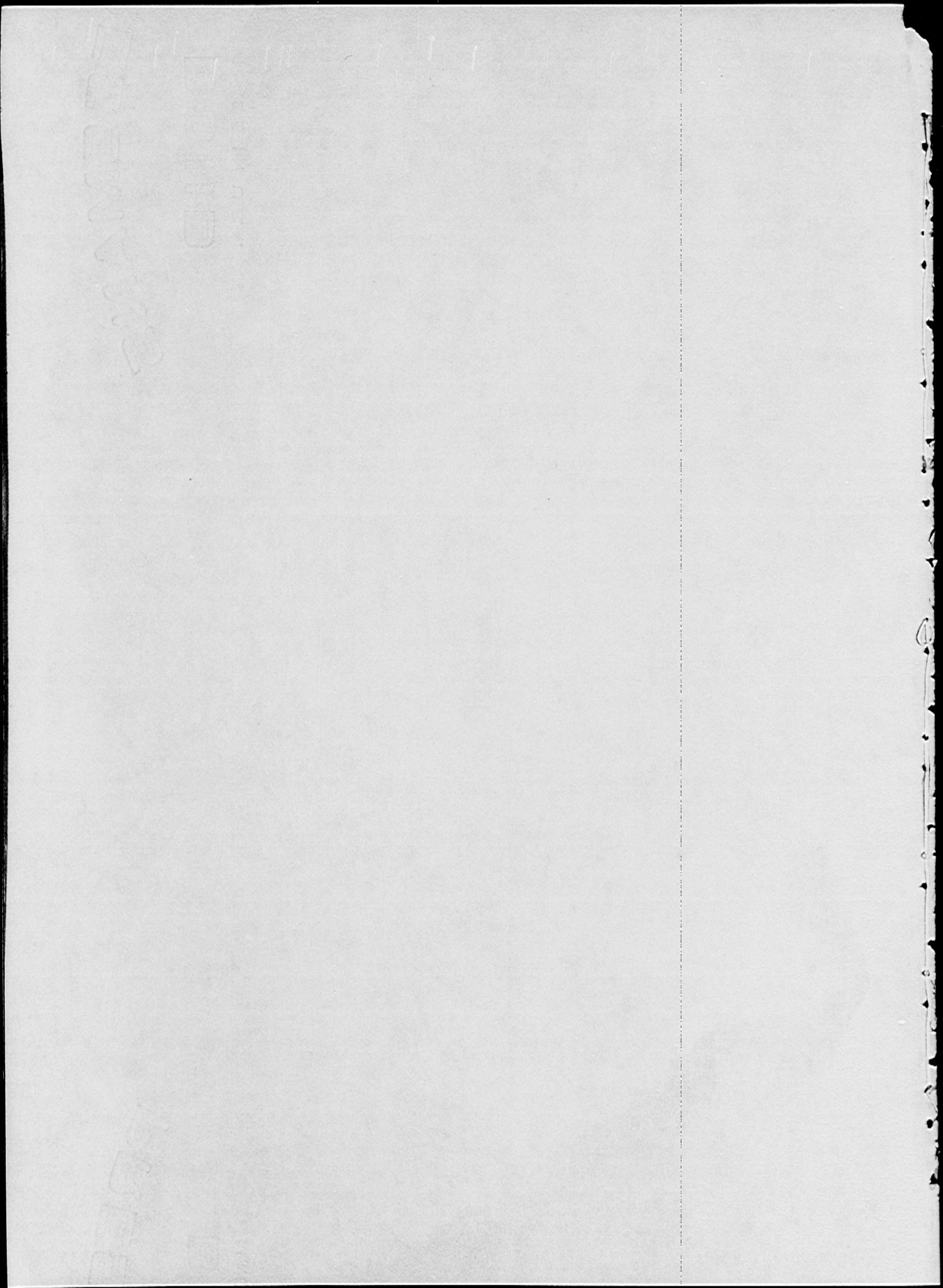
CHESTER H. GRAY,
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Principal Assistant Corporation
Counsel, D. C.

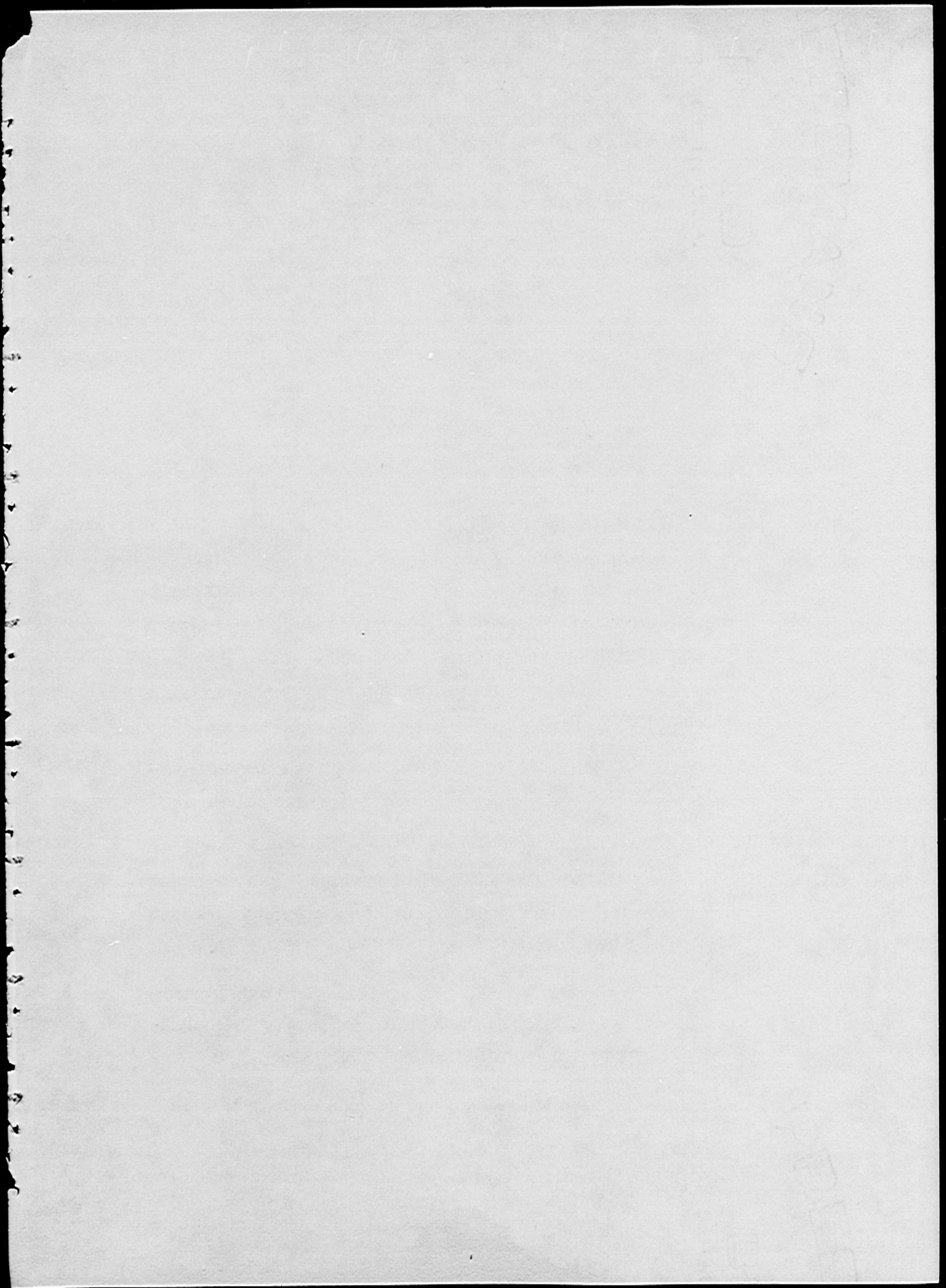
HENRY E. WIXON,
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JOINT APPENDIX



INDEX

	<u>Page</u>
Petition filed January 31, 1963, by Norwood Studios, Inc., in the District of Columbia Tax Court, Docket No. 1860	1
Excerpts from Transcript of Proceedings:	
<u>Burrowes, Thomas H.:</u>	
Direct Examination	6
Cross Examination	7, 56
<u>Martin, Philip, Jr.:</u>	
Direct Examination	10, 61
Cross Examination	21, 66
Redirect Examination	45
<u>Nastick, Frank A.:</u>	
Direct Examination	46
<u>Collett, Ralph W.:</u>	
Direct Examination	50
Cross Examination	54
<u>Barker, James A.:</u>	
Direct Examination	68
Cross Examination	71

INDEX

	<u>Page</u>
Stipulation filed July 22, 1963	79
Findings of Fact and Opinion filed August 1, 1963	81
Findings of Fact	81
Opinion	88
Appendices	94
Decision filed August 1, 1963	123
Motion to Revise Findings of Fact, to Vacate Decision in Favor of Petitioner, and for Entry of Decision in Favor of Respondent, filed September 3, 1963.....	124
Opposition to Motion to Revise Findings of Fact, to Vacate Decision in Favor of Petitioner, and for Entry of Decision in Favor of Respondent, filed September 10, 1963.....	128
Memorandum, and Order Amending Findings of Fact, filed September 11, 1963	132
Petition for Review of a Decision of the District of Columbia Tax Court, filed October 10, 1963	135
Docket Entries: Docket No. 1860	137

DISTRICT OF COLUMBIA TAX COURT

NORWOOD STUDIOS, INC.,)
Petitioner) FILED
) January 31, 1963
v.)
) Docket No. 1860
DISTRICT OF COLUMBIA,)
Respondent)

PETITION

The above-named petitioner appeals from an assessment of taxes against it, and avers as follows:

1. The petitioner is a corporation with principal office at 926 New Jersey Avenue, N.W., Washington, D.C.
2. The tax in controversy is sales tax for the period June 1, 1958 to May 31, 1959 in the amount of \$3,786.60, for the period June 1, 1959 to May 31, 1960 in the amount of \$6,797.66 and for the period June 1, 1960 to January 31, 1961 in the amount of \$4,130.56.
3. The notices of assessment were dated November 2, 1962, as will appear from the copies thereof hereto attached as Exhibit "A". The notices were mailed to the petitioner on November 9, 1962; the taxes were paid by the petitioner on December 13, 1962.
4. The assessments of tax are based upon the following errors:

(a) The transactions are exempt from sales tax as personal services which involve sales as inconsequential elements, pursuant to the provisions of Section 47-2601-14(b) (3), D.C. Code (1961 Ed.), and Section 202(b) of the Sales Tax regulations.

(b) The imposition of sales taxes on the transactions involved, represents an unreasonable burden on interstate commerce, prohibited by the Constitution of the United States and by Section 47-2605 (m), D.C. Code (1961 Ed.), and as defined in Section 401(1) of the Sales Tax regulations.

5. The facts upon which the petitioner relies are as follows:

The petitioner during the periods involved had entered into certain contracts with the American Federation of Labor and Congress of Industrial Organization. These contracts provided for the production of certain films on behalf of the AFL-CIO and for the distribution of such films among numerous television stations throughout the United States. The agreements required the petitioner to provide the artistic and technical services as well as the necessary materials to produce these films. In addition, the petitioner was obligated to ship the completed films to television stations selected by the union. Only a small portion of the production activity and virtually none of the use of films took place within the District of Columbia. The amount of material actually used in the production of said films represents less than 10 per cent of the total contract price in each instance.

WHEREFORE, the petitioner prays that this Court may hear the case and

1. Enter its decision and judgment that the sales taxes in question were illegally assessed and are invalid.
2. That the respondent be ordered to refund the entire amount of said taxes to the petitioner, with interest as required by law.

NORWOOD STUDIOS, INC.

By s/ Thomas H. Burrowes
Thomas H. Burrowes, Vice President
926 New Jersey Avenue, N. W.
Washington, D. C.

s/ Nathan Sinrod
Nathan Sinrod

s/ Werner Strupp
Werner Strupp
Attorneys for Petitioner
1735 DeSales Street, N.W.
Washington 6, D.C.

District of Columbia) ss:
)

Thomas H. Burrowes, being duly sworn, says that he is the Vice President of the petitioner above named and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that he verily believes that said statements are true.

s/ Thomas H. Burrowes
Thomas H. Burrowes

Subscribed and sworn to before me this 31st day of January, 1963.

s/ Ethna White
Notary Public, D.C.

(SEAL)

My commission expires February 28, 1966.

----- X
NORWOOD STUDIOS, INC., :
Petitioner :
vs. : DOCKET NO. 1860
THE DISTRICT OF COLUMBIA, :
Respondent :
----- X

1

Room 15
Municipal Court Building
5th and E Streets,
Tuesday, April 16, 1963.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

THE HONORABLE JO V. MORGAN

* * *

5

THOMAS H. BURROWES

was called a witness on behalf of the petitioner, and, upon being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STRUPP:

* * *

Q Mr. Burrowes, would you state your occupation, please?

6 A Vice president of Norwood Studios, Inc.

Q How long have you held this position?

A Since 1958.

* * *

19

CROSS EXAMINATION

BY MR. WIXON:

Q Mr. Burrowes, what is an answer print?

A I beg pardon?

Q What is an answer print?

A It is the first print that is made of a motion picture. It is what we call a trial print. It is made from the show as mixed at the laboratory. It is the first -- well, I believe that describes it adequately. It is the first print made of a show. We use this print to see whether or not the scenes are properly lit, whether or not any corrections have to be made in making the motion picture.

Q Does that answer print have any further use, Mr. Burrowes, after it is made?

A Normally not, sir.

Q You say it is just a trial?

A It is called loosely a "first trial print." It is used as a checking device to see whether or not, what changes have to be made in a show.

THE COURT: You say normally it is not used?

THE WITNESS: I would say normally it is not used, because it is usually not right. You look at it and you say, "I want to change this; I want to change that, and I want to change this and that." It is kind of a proof.

20 THE COURT: What do you do?

THE WITNESS: You send it back to the laboratory and say, "I want to make the following changes in this print."

THE COURT: When the change is made, what do you do with it?

THE WITNESS: When the changes are made?

THE COURT: Yes.

THE WITNESS: Usually the print, itself, it is just part of a pre-print material. It is no longer used. You make additional prints which are correct and they are used.

THE COURT: I can understand that. But what happens to it. Do you hang it up?

THE WITNESS: We usually, I imagine, we just put it in our vaults or just store it. It has no further value.

THE COURT: Why do you store it if it has no further value?

THE WITNESS: Well, it is sometime necessary to go back and check the print to see whether or not these corrections have been made. It is just a checking device. In making a film you have lots of stages you go through.

THE COURT: That is not delivered to the customer?

THE WITNESS: Well, the customer usually screens the answer print. He comes to the studio and he looks at the answer print along with you to give you his ideas.

THE COURT: I understand that, but you don't give
21 it to him? It doesn't belong to him?

THE WITNESS: It depends. Customarily, -- it depends on the contract. Normally, it is our property, because it is one of the pre-print materials that we used in making the motion picture.

BY MR. WIXON:

Q These answer prints that are involved in this particular series of contracts, they were required to be delivered to the AFL-CIO, were they not, by the terms of the contract?

A Does the contract call for it? I don't have the contract in front of me, sir.

Q I take it there is also a negative there, in addition to the answer print, is that right?

A Yes, sir, which negatives are you referring to?

Q I don't know sir. You said an answer print had no further utility after it had been made?

A There is also a negative. There is a negative of the optical sound tract, there is a negative of the picture. These are used to make

additional prints. An answer print is a positive projection print. It is a print you put in a projector and look at on the screen. You don't project negatives normally.

Q Yes. Well in the use of the answer print, can you make other negatives or other prints from the answer print?

22 **A** No, sir. Well, may I correct that? You could but it is unusual. You just don't do it. You make additional prints from a negative. An answer print is a positive print, sir.

* * *

28 **THE COURT:** I listened to a lot of testimony but I don't know what you do.

THE WITNESS: We make motion pictures, Your Honor.

* * *

PHILIP MARTIN, JR.

was called as a witness for the Petitioner, and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE COURT: Will you please give your full name and address to the Reporter?

THE WITNESS: Philip Martin, Jr., 14705 Carrollton
29 Road, Rockville Maryland.

BY MR. STRUPP:

Q State your occupation, please.

A Motion picture producer.

Q Do you hold any official position with Norwood Studios?

A I am president of the company.

Q How long have you held that position?

A Since the inception of the company as the sole ownership and
then afterwards it became a corporation in 1957.

* * *

Q How long have you been in the motion picture producing business
with Norwood or otherwise?

A Since 1937.

Q Are you familiar with the work performed by Norwood in
connection with contracts that are in evidence?

A Yes, I am.

Q Can you tell us what Norwood did pursuant to these agreements?

* * *

30 A Well, it begins with the inception of an idea, which in this case
would be, as applied to these contracts would be --

Q Can you raise your voice?

A I am sorry, sir. It begins with the creation of an idea. In this
case it was a series of motion pictures dealing with various industries.

As a typical case, for instance, if we are going to do a picture based on railroad industries or railroads, we would put a writer to work who would research and find out what is the story.

THE COURT: You are saying what you would do. He asked you what you did.

THE WITNESS: I am sorry. We put a writer to work and he researches everything that would be known about railroads and we use as much of it as we can possibly get in a 13 and a half minute motion picture.

THE COURT: Do these contracts involve railroads?

THE WITNESS: It involved 104 different industries.

THE COURT: What he wants to know is what you actually did.

31 THE WITNESS: On 104 different subjects covered by these contracts we assigned writers what we call shooting writers and shooting scripts. These are turned over to associates and unit managers who then take photographic crews all over the United States to photograph the material called for in these scripts. This material, in turn, is edited, a narration is written to the picture and, in turn, sound is selected, sound effects are selected, appropriate music is composed and played and recorded to the picture and the result of all of this work is printed and comes out, written out as released prints. This is the actual thing that is used on a television station motion picture.

THE COURT: Is that what you did in completing these agreements?

THE WITNESS: Yes, sir.

BY MR. STRUPP:

Q You say there were 104 subject matters?

A Covered between the two prime contracts that we talked about in N-211 and N-320.

Q There were 104 subjects?

A That is correct.

Q Who specified the subjects?

A AFL-CIO.

Q I think you mentioned writers and associate producers. Are these persons employed by you?

32 A That is correct.

Q Are there any other persons whose services you used in connection with the production of these films?

Any other types of work?

A I just had directors, I used assistant cameramen, cameramen, soundmen, electricians, film editors, assistant film editors, sound cutters, projectionists, narrators.

THE COURT: What do you mean "Narrators"?

THE WITNESS: A man like Matthew Warren.

THE COURT: Who tells about the picture?

THE WITNESS: We use his voice. The writer prepares the script and then he reads it against the picture. You hear his voice on the film. That is called a narration or voice over type of delivery.

BY MR. STRUPP:

Q How would you select a writer, for example?

A In this case, when we work on these shows, we had three and sometimes four writers which we interviewed and then were, in turn, approved by the AFL-CIO and they were assigned to the pictures.

THE COURT: Why do they have to approve them? The contract didn't call for them, did it?

THE WITNESS: I am not sure. I would have to refer to it. But it is generally accorded the client the privilege of selecting a writer. In many cases it is just for political (33) reasons. If the writer had a reputation for being, perhaps, anti-labor, they wouldn't want us to employ him on a labor picture.

* * *

BY MR. STRUPP:

Q What criterion did you use in this sense, if any?

A Basically these were narrative films; therefore, we used writers that were familiar with what we call a documentary technique or technical writing in some cases rather than to differentiate between that and

what we would call a dramatic writer, a person who writes plot or dialogue.

Q Are these persons employed by you or were they hired for this specific job?

A As I recall, one of the writers was on staff at the time and we hired three more and they were permanently on staff during the production of the picture.

THE COURT: How long did it take to produce this?

THE WITNESS: Each one broke into a schedule of about five weeks from the time that the AFL-CIO approved the idea of each one, until such time as it was shipped to the television stations.

BY MR. STRUPP:

34 Q Can you explain that a little further? You said that the subject matter was furnished, your men wrote the particular script and the film was produced for showing to the Union. What happened after that and how was this done?

A The Union assigned a liaison man who we reported to in all phases of the work through whatever channels they wanted to set it up. They decided what shows we should do and made arrangements for our writer to contact the people where they could get the information about a particular industry and also made the arrangements for us to go to a particular place and get into a particular plant. From that point on we would proceed to, as I pointed out, develop the script and go to the location

and do the photography and complete the picture in that manner. I think I described the production.

Q What happened after that, when the completed picture was brought back to Washington?

A Well, it is not completed.

Q Well, when the shooting at the scene and whatever else had to be done was finished, what did you do then?

A All right. That is what is called exposed but undeveloped film and this goes to a laboratory where it is developed, becomes a negative. It is then printed on positive film for the purposes of editing it and cutting it up and this is called a work print which is used as a
35 guide later on to prepare the negative so that completed prints can be made or released prints.

Q What is an answer print?

A Well, it is what is called a "first trial print." What it actually is is a device -- rather it is a positive print, which after the negative has been matched and the sound track has been put to it, you then use this print to judge as to whether the optical effects are in the right place. That is the fades and dissolves and whether the sound is synchronized properly and whether the negative has been cut properly, the timing and whether the density of the scenes is correct. It is almost equivalent to what you would call a printer's proof if you want to think of it in that manner.

Q To whom is it shown?

A It is shown to everybody that is involved. It is shown to laboratory people who have done the processing. It is shown to our staff to check for any corrections and anything else that has to be done and it is shown to the client for his suggestions as to any changes that will have to be made.

Q And what happens after this?

A Then the corrections are made, based on the trial -- the first trial print and the release prints are then struck. The release prints are then shipped as designated by (36) the AFL-CIO.

THE COURT: Where did you ship them?

THE WITNESS: Starting off with the original print order -- there were around some fifty-odd prints and these were immediately shipped to television stations all over the United States. Part of our contract required that we ship these. Our contract was not completed until such time as we had shipped the prints to the television stations and for a scheduling as set up in the contract. They supplied us with the names of the television stations that the prints were supposed to go to.

THE COURT: Did you deliver them?

THE WITNESS: They were sent by parcel post.

BY MR. STRUPP:

Q You mailed them to the designated addresses, is that correct?

A That is correct, yes.

* * *

BY MR. STRUPP:

Q A few moments ago, Mr. Martin, you referred to work that was done by laboratories. I assume you mean
37 other than your own employees or persons under contract, is that right?

A That is right. We don't run a laboratory.

Q What does the laboratory do for you or what did the laboratory do in connection with this work here?

A Well, it developed the negatives. The negative is the material, of course, that is in the camera. There is a latent image on it and you can't see anything until such time as it develops, so the laboratory has the machinery for developing the negative.

Then they struck for us a work print of the entire shot negative and this would possibly be on a ratio varying from 6 to 1 to 15 to 1, referring to the subject matter. When I refer to that, I mean in relation to what finally went into the picture.

This came back to our studio where it is edited and the sound effects were added, the music tracks were built. Then it went back to the laboratory where what we call a mix is accomplished. That is where you

take the voice, music and sound effects and put them all on one track at the proper level, so that they don't disturb you by the music being so loud that you can't hear the words, et cetera.

Then this track is sent back and synchronized with the cut or matched negative which has been matched

38 to the work print and it proceeds to go back to the laboratory where the answer print or the trial print is made and the trial print was then run for the laboratory personnel, our personnel and the client. And then the prints are made for the cut negative and the track and shipped as designated by the client.

Q The various things that a laboratory makes for you, that you have enumerated, what was finally sent to the client in this case? Tangentially, physically?

A Well, the released print.

Q What is the released print? Is that the final product?

A It is the final product. It is the only thing that means anything. Anything along the line is just a part of accomplishing the released print. The negative, as such, is only a means to an end. The work print is a means to an end.

The negative sound track as such cannot be projected. You can't run it. You can't run a negative and use it for anything, so the end of the line and the only thing that really represents anything at all is the released print.

This is the true trial result. Anything else is just a part of the system.

Q Do you have a released print with you?

39 **A** Yes, I have one here.

Q Could you show it to His Honor, please?

(The print was shown to the Judge.)

THE WITNESS: This is just one print or one of the series. It is 16 millimeter sound. The running time is 13 and a half minutes. Approximately 508 feet, black and white subject.

* * *

BY MR. STRUPP:

Q Is this one of the release prints involved in these contracts?

A That is right.

MR. STRUPP: I will offer it in evidence.

THE COURT: I think that would be good.

40 Is this typical of all of them?

THE WITNESS: Yes, sir.

THE COURT: And this is the one that you mailed to the various --

THE WITNESS: Television stations.

THE COURT: Television stations at the direction of the CIA?

THE WITNESS: CIO. They supplied us with what is called a shipping sheet on a picture and it designates exactly what station they are supposed to go to for the number of prints that we have.

* * *

43

CROSS EXAMINATION

BY MR. WIXON:

Q Mr. Martin, you testified that until you got the
44 final print all of the activities which led up to it were details necessary to complete the matter, but that the objective was to get the final print, am I correct, sir?

A That is correct.

Q Would I be correct sir, if I assumed that the object of this contract between your studio and the AFL-CIO was to obtain a final print of a film depicting some activity and that that was all that the AFL-CIO was interested in getting?

A I would only correct that by saying "in its final prints."

Q The final picture or how you would describe it in words?

A The contract calls for so many prints.

Q Without the ultimate production of the print or the film, AFL-CIO would have had nothing, is that correct, sir?

A That is correct.

* * *

55 BY MR. WIXON:

Q I asked you about this No. 1, 16 millimeter black and white work picture, properly marked and cued. You were going to go ahead and describe what a work picture was and there was an interruption.

A The work picture is in two forms. One is considered to be the first print that comes off the negative in its entire length. Then all of these various scenes in work picture form are edited down and each scene is spliced (56) together. It is no continual length. It is like home movies. There is a splice present. This is moved around and in the process it gets scratched and broken and dirty. When you finally finish up with it, the only thing it is used for is to go back because -- there is a serial number on every foot of print -- to patch the negative to that and carefully cut the negative to match it, so that all the prints come out to coincide with the work print. They are complete with no splices in them and the sound track is added to it.

THE COURT: What happened to it?

THE WITNESS: Other than to let it kick around some place, it is thrown in the ashcan. It is no good. It is like rough stuff that you draft with a letter. It could be equivalent to yellow paper that you work a letter up, which is eventually going to be transferred off of this and go into a letterhead or something better, but it is balled up and thrown in

the wastepaper basket. Of course, nobody is ever interested in letting things like this lay around so they either authorize us to destroy it or they take it themselves and destroy it.

BY MR. WIXON:

Q Did you under this contract, which is marked Petitioner's Exhibit No. 5 -- and all my questions will be relating to this No. 5 -- did you deliver to AFL-CIO the (57) 16 millimeter black and white work picture properly marked and accompanied as called for under paragraph "E"?

* * *

THE WITNESS: We simply stored it for them.

THE COURT: I mean when you finished it?

THE WITNESS: Stored it for them.

THE COURT: What did you do?

THE WITNESS: Put it in the vault and left it there.

* * *

59

BY MR. WIXON:

Q Was that done? Was there such an item as this No. 1, 16 millimeter black and white work picture under this contract?

A Certainly.

Q There was?

A Certainly.

Q Whose property was it?

A Well, like everything else under the contract, the AFL-CIO's.

Q All right.

No. 2 in the same paragraph is "minus dialogue, magnetic sound track consisting of music and effects on 35 millimeter magnetic film, " --

MR. WIXON: Now, Your Honor, every one of these items I am reading is unless the same paragraph designation, "I."

60 BY MR. WIXON:

Q Did Norwood Studios made its delivery as required under this paragraph "I" Item No. 2?

A In the terms that I described to you, yes.

Q There was such a thing?

A This, again, is a piece of something. In other words, it is not anything complete, as such.

THE COURT: You mean that is part of the process?

THE WITNESS: That is correct. There is just as much of a piece of process as carbon paper in a typing job. You can't do it without it, but as far as it is concerned it is nothing by itself.

BY MR. WIXON:

Q You can't show it?

A No, of course not.

Q You can't run it on a television program or anything of that sort?

A No, sir.

Q It is one of the items in process to the final print?

A That is correct.

* * *

61 BY MR. WIXON:

Q Would you please, sir, look at page 6-J? Can you tell me whether there is any finished product called for there?

A Everything there, Section 1 and 2 are both finished project.

Q So Section J is the section of the contract which requires the manufacture of the finished product?

A That is the finished product.

Q Did you manufacture the finished product, yourself?

A No, we didn't.

62 Q I understand you have no laboratory for that purpose?

A Yes.

Q Where was that work done?

A Capital Film Laboratories.

Q Who ordered it?

A Well, we ordered it under the terms of the contract.

Q I see.

THE COURT: The subcontractors?

THE WITNESS: Yes.

THE COURT: What did they do?

THE WITNESS: They have the machinery and developing equipment. In other words, they can take our negative or the negative that we have come up with and print it and process it so that it becomes a release print that can be used on television or run on a motion picture projector.

THE COURT: Who took the picture?

THE WITNESS: We did.

THE COURT: I mean they are the developers?

THE WITNESS: That is right, developing and printing.

BY MR. WIXON:

Q And you used them to complete the requirements of the contract in respect of these particular finished prints?

63 **A** Yes.

* * *

64 **Q** Did you receive instructions from the AFL-CIO at your place of business in the District in respect to mailing or sending any of these release prints out?

A Yes, sir.

Q How did that instruction come to you?

A It came to us in the form of a printed form prepared by the AFL-CIO supplied to us which told us to send so many prints to so many different television stations indicating the call letters of the station and its location and the date that it was supposed to be there.

Q I believe you testified that you packaged them properly and sent them out by parcel post. Am I correct, sir?

A That is correct.

Q And when you send them out by parcel post, whose properties were these?

A The AFL-CIO.

Q Did you deal with the AFL-CIO in the District of Columbia?

A That is correct.

Q Was this contract executed in the District of Columbia?

A It was.

* * *

68 **Q** Was there some person employed by AFL-CIO who was responsible for giving you final approval?

A Yes.

Q Was he located in the District or were his offices outside, do you know?

A Well, again this could be a combination because when the answer print was run on the first trial, in many cases the out-of-state or out of the District representative would attend, and it would be a decision, a joint decision by that man and the Washington representative.

Q In other words, you might have had a series of people involved in these particular matters?

A Yes.

Q No one man was completely responsible?

A That is correct.

Q Tell me, sir, you package these up and mail them. Did you have any particular label identifying the items as belonging to anyone in particular?

A Just like that.

Q On a package that went out?

A It is on the evidence.

* * *

BY MR. WIXON:

70 Q I notice clause 4, paragraph 4 of Petitioner's Exhibit No. 5, which is "Contract N-320," has "Miscellaneous,

71 A, Others than the series of the TV Coordinator, postal and express charges, all costs involved in the production and distribution of these shows will be borne by the contractor."

I take it that you were reimbursed for postal and express charges in connection with the sending of these films to television stations throughout the country?

A Yes, sir.

Q Was there a separate billing for those items?

A To the best of my recollection there was. I don't have the facts in front of me. We must have recovered in some manner.

Q Would I be accurate to say after the thing was finalized, the prints run off and completed and accepted by the AFL-CIO, you got instructions to send the prints to certain designated television stations?

A No, you are not correct.

Q I am not correct. All right, sir. I misunderstood you earlier. Go ahead. What is correct?

A It is correct that our work was completed when the prints had been shipped to the designated place. There is no approval upon each individual to release print.

Q I didn't think I had said that. I said when the prints were finalized, completed, accepted, then you got instructions from AFL-CIO to send them somewhere?

72 A Yes, sir.

Q You never were told to send those things?

A Yes, sir, we were told to send them but there was no acceptance.

The acceptance is only on the fact that we shipped them.

Q All right. When were you told, Mr. Martin, to send them some place?

A Very far in advance. It was all laid out a year in advance.

Q They told you after the contract was entered into?

A Shortly after they supplied us with a list where to ship them.

Q So you knew in advance where to ship them?

A That is correct.

Q You ran off the film?

A Made the prints.

Q The prints made and then following your instructions, sent these out to various television stations?

A That was the completion of the job.

* * *

BY MR. WIXON:

73 Q Did you advise AFL-CIO that you had shipped? Were they ever made aware of that fact.

A Yes.

Q Is there any formal document on it?

A There is a sign-off.

Q A sign-off. Does that have some particular significance?

A Well, it means the fact that they recognized that we had completed the services required by the contract at that point we were eligible to be paid per segment of the series.

Q In other words, you, somehow, they were made aware that you had in fact sent these out?

A That is correct.

Q You did that how, by telephone call, by statement or how did you handle it?

A I don't recall what method was used.

* * *

75 THE COURT: Yes. I want to ask some questions. I noticed on television, motion pictures, someone is designated as a producer, somebody the director. What is the producer. What is the function of a producer?

THE WITNESS: He is a high class coordinator.

THE COURT: I didn't know that that was what you meant.

THE WITNESS: Well, you are involved in a lot of mechanical work. You are involved in a group of artistic endeavors. Somebody has to be responsible for the fact that the director, while he has a great deal of

freedom, still adheres to the script and he is in a sense watched to see that he brings the picture in on time, that he does go by the script. The producer in the beginning works with the writer. If he finds out that the writer is not able to come up with the story that he feels is proper, then he works with the writer to correct his thoughts, to help him along or if need be replace the writer and get another writer.

THE COURT: Well, I noticed that in many pictures a company, for instance, like Warner Brothers, is the one whose name is on the picture, but when you get down to the long list of people, an individual is called the producer. Why isn't the company the producer?

THE WITNESS: Because the company is a production company. It is the means by which the production is (76) accomplished, but the producer, the individual producer is put in the work and responsibility of the over-all of the picture.

THE COURT: He is employed by the company?

THE WITNESS: Oh, yes. Certainly.

THE COURT: That doesn't mean the same as your company being the producer?

THE WITNESS: Oh, yes. We have a producer assigned. In other words, we are a production company and produce many films to which we assign many individual producers.

THE COURT: Did you do that in this case?

THE WITNESS: Yes, sure we assigned a producer.

THE COURT: You had a producer?

THE WITNESS: Yes.

THE COURT: In addition to your company being the production
company?

THE WITNESS: Yes.

THE COURT: And his work is to carry out the plans, whatever
are required?

THE WITNESS: Yes.

BY MR. WIXON:

Q Did you employ any subcontractors in the carrying out of the
activities described in this contractor or these contracts?

THE COURT: He has already testified.

77 MR. WIXON: I said "subcontractors." He mentioned one,
Capital Film, which he said did that work.

THE COURT: Developed it.

BY MR. WIXON:

Q Any others, sir?

THE COURT: Any other subcontractor?

THE WITNESS: I was just trying to think. I am sure we must
have in some cases along the line, but not as a permanent alliance type of

thing that we have with Capital. Capital processed all of the film on this entire series. It could very well be that we subcontracted something when we were out on location such as the need for scaffolding, rent some scaffolding, supplied some scaffolding, or maybe we didn't take our lights with us because it was too far and we picked up lights there. That type of a subcontractor. Is that what you had reference to?

MR. WILSON:

Q I would assume you had work of that type. I meant subcontractors perhaps to produce a part of the film.

A Oh, no.

Q That was done with your own personnel?

A That is correct.

Q Were these personnel your regular personnel or were they temporary people or what was their situation?

A Well, in some cases they are regular and in some cases they are contract.

Q And who would you have contracted with, the type of person that you would have contracted with?

A Well, in -- you can contract for some phases of electrical work. In other words, you hire a man and you hire his equipment and you hire anything else that he has along with him, so he is in a sense a private contractor.

Q Did you have to do that quite a bit? That is a bad word to use but I haven't any others.

THE COURT: Ask him if he did it at all.

MR. WIXON: He said he did.

THE WITNESS: Oh, yes. I don't recall as to what the percentage would be, but it was perfectly capable of doing it, and we have done it and I am sure it happened on some series of this show.

BY MR. WIXON:

Q Did you enter into contracts with some writers?

A I don't recall that we had contracts, they were hired on a permanent basis, I believe. In other words, they were hired until fired. They were not picked up for the show and dropped after that. They were put on and they not only worked on this series but possibly some other pictures that were going in the studio.

Q Tell me. How many people altogether would it be your judgment it took to produce one of the films called for '(79) in one of these contracts, any one?

A Do you want that to include the subcontractors?

Q Everybody. How many people are involved?

THE COURT: Take your own place first.

THE WITNESS: I would say as far as our own company was concerned, there was possibly as high as, oh, twenty-five to thirty people

involved and then as far as the subcontractors were concerned possibly another fifty or so involved.

Q The types of people, sir, that were used to produce one of these films, would you describe the types? By that, I mean, sir, you had mentioned electricians, scaffold men. That is what I mean by describing them.

A Well, you are starting off at the beginning with your producer. I would consider him as a professional person. Is that what you want?

THE COURT: The description applied to the different people.

THE WITNESS: Let's try to break it down between professional and highly skilled. Professional is the producer, the director, the writer, the film editor, the cameramen. These, I would consider, as being professional people.

The skilled technicians or the assistant cameramen, the electricians, the grips --

BY MR. WIXON:

Q What is a grips?

80 **A** He is a specialist in building things. You might call him a carpenter but in the industry he is referred to as a grip. On down through the line of various assistants. Sound recording man I would classify as a professional. Each phase of it has assistants attached to it and apprentices. I think that generally covers it.

Q How many cameramen did you have on?

A In this case we had two cameramen and two assistants.

Q They were assisting -- you use the word "assistants," you mean who were assisting in the setting up of the necessary equipment for taking pictures?

A No, they assist the cameraman only. In other words, a cameraman and an assistant cameraman. In some cases you have an operative cameraman, too.

Q To that, I take it you would have to add the necessary personnel to process the films? They were Capital Film Company's people in the entire operation?

A Yes.

Q Anybody else that you can think of? You kind of dropped off when you got down to the cameramen.

A There are so many categories of work I could go on. It is like a telephone book. For your information there are forty-four unions who govern the type of work we do, individual unions. It is a little complex. They are (81) all specialists. Everybody is highly accomplished in his own field and highly paid.

Q But in any event, in order to produce this it takes a great number of people with a great number of skills or aptitudes?

A I wouldn't call it a great number of people. I would say it would take a number of people with great skills and aptitudes.

A Aside from the actual film-making, the Capital Film bid, were you able to handle all other phases of the production -- I am not speaking in terms of going out and hiring an electrician, but was your company set up and equipped to take care of all of the other operational activities involved in the production of the films called for by these contracts?

A I would say 99 per cent.

Q The 1 per cent being what, sir?

A I just can't put my finger on it, but I wouldn't want to say to you that there isn't some small possibility that somebody did something for us other than Capital Film Laboratories.

* * *

82 Q Mr. Martin, did the AFL-CIO direct your company to hire any particular persons?

A No. As far as I know they only exercised a judgment to not accept a couple that we offered.

Q Was that for reasons of failure to maintain union affiliation or some other reason, that you know?

A It was political.

Q Aside from those individuals that you mentioned, however, all the personnel involved in the production of the films that these contracts call for were your personnel?

A They were contracted for by us or hired by us.

Q Did the AFL-CIO name or state to you that any particular individual was supposed to do any particular thing with respect of the manufacture of these films?

THE COURT: You mean affirmatively?

83 **MR. WIXON:** Yes, sir. That is to say, "I wish to have Mr. Jones."

THE COURT: If you know?

THE WITNESS: I think there were possibly a few cases where they suggested that one of the writing team might do better on a certain subject than on another one.

* * *

Q With the exceptions of those persons who for political reasons were not acceptable to AFL-CIO and a suggestion that a particular writer might do a better job, the control of the personnel, their supervision, their engagement, and their work operations remained solely with Norwood Studios, Inc., am I correct?

* * *

84 I would say insofar as our directing them to do things that had been approved by the AFL-CIO, this is correct.

* * *

Q Now, when you say "had been approved," do you mean in respect of the particular site to be used for the filming of a picture?

A That is correct or the particular location or the date that they are supposed to be there or possibly, in some cases what means of transportation was used or something of that sort.

Q Other than that though, the full responsibility was Norwood Studios?

A Yes.

Q Are there other companies, to your knowledge, engaged in the type of work that the corporation you head is engaged in?

A Yes, there are.

Q Are there any located in the District?

A Yes, sir, there are.

Q Would you know how many, sir?

A I would say about six.

Q Six. Are there other such studios or photographic laboratories, the kind that you have, sir, in other cities (85) in this country?

A Yes, there are.

Q In nearby Washington that you know of?

A Yes.

Q Would you say, sir, there are a number of organizations involved in this type of production?

THE COURT: He said there were six.

BY MR. WIXON:

Q A number in the country?

A Yes.

Q Is the type of work that is described in these several contracts that are in evidence a type of work that is done generally by studios or laboratories of the type of Norwood Studios? You understand, sir, I am not identifying AFL-CIO here. I am talking about the type of work, the making of a particular picture of some subject for someone.

A In other words, do other people make the same type of pictures?

Q Do the same things that are described to be done in this contract?

A Oh, yes.

Q Would it be correct to say that the studios that you referred to as being similar to the one that you head in the Washington area would, in making a film do generally the same things that your company did under these contracts?

86 A They could, if they had the capability.

THE COURT: I don't know what you mean by "they could, if they had the capability."

THE WITNESS: Well, it is a very strange situation. That is a man can call himself a motion picture company or calls himself a producer, even if he just has an office space. He can advertise and can in the yellow telephone book say, "I am a producer." He might be a small installation that has a girl and maybe an associate producer or some help, but he has to go outside and hire everybody to do it. He has to pull in free lance men to do the work. Then he might be an organization and maybe he has one camera crew, but this operation was big enough that we had to have two camera crews going at all the time and four film editors. They are generally engaged in the same type of work that we are, but they specifically would not have the capability of this contract.

BY MR. WIXON:

Q You mean by that their facilities are not as adequate as yours for this type of production?

A Not necessarily facilities. It is manpower.

Q Manpower?

A Yes, sir.

* * *

BY MR. WIXON:

88 Q One thing, sir. There has been offered and admitted
89 in evidence Petitioner's Exhibit No. 3, which is N-211, Music.
It is a letter, as you are aware of. Would you please tell me, sir, what
you were supposed to do, your company was supposed to do in accordance
with this letter?

* * *

THE WITNESS: We engaged a composer to compose a certain amount of music which is regulated by union regulations as to how much original music is supposed to be in each picture. This, in turn, the music was composed and then it was arranged and then it is copied.

THE COURT: Who did the arranging?

THE WITNESS: This is done in the case of the -- the composer actually did the arranging. He did the job. Then it is copied, depending on the number of pieces that are going (90) to be used. When I say "number of pieces," I mean musicians. Then the musicians are engaged and they play the section, which is a 3-hour duration, so much per man for the 3-hour sessions.

THE COURT: Who pays them?

THE WITNESS: We pay them. Then this music is recorded on magnetic tape. Then during the process of the making --

THE COURT: Who recorded your magnetic tape?

THE WITNESS: Either we did it or a subcontractor did it.

THE COURT: Do you know who did it?

THE WITNESS: In some cases we did it ourselves and in some cases we subcontracted. If we subcontracted it would be Capital Film Laboratories.

THE COURT: Did it have anything to do with production?

THE WITNESS: It is part of the ingredient of making the motion picture.

THE COURT: What about production? Is it a part of production?

THE WITNESS: Yes, sir, I would consider it as part of production. To give an example, if we hadn't done this, the picture would have come out without any music on it, so it is part of production. This is then put on (91) magnetic tape and then used on the picture. As far as the union regulations and everything else are concerned, that is the end of it. You don't use it any more. As background music it could be replayed again and recorded again, which you are not supposed to use the same tape you made because this is considered library material and it is against union regulations.

Q Did the AFL-CIO instruct your company to hire any particular musician or musicians?

A No, they approved the composer. The hiring of musicians is practically out of our hands. You have to go to the musicians local here and unless you can actually state a reason why such and such oboist shouldn't play the oboe, when he is available he does the job.

Q In other words, the musicians are assigned to you by the union?

A In a sense they have to be union men, unless you have a good and sufficient reason for not using them.

* * *

97 Q Do you have personnel on your staff capable of producing this music, sir? This original music?

A No. The man that was engaged had done previous pictures for us, but he was not -- I wouldn't describe him as a permanent employee.

THE COURT: Was he an independent contractor?

THE WITNESS: Yes, I would say so.

THE COURT: Like a lawyer?

THE WITNESS: That is correct, yes. Of course, he is a professional person.

THE COURT: I understand.

* * *

REDIRECT EXAMINATION

BY MR. STRUPP:

Q In connection with Petitioner's Exhibit No. 1, Mr. Martin, entitled "It's Good Business," Mr. Wixon (98) established that, and you agreed, there was no specific reference to the number of prints, released prints to be sent to the union in that contract. Do you know whether, in fact, prints were shipped to anyone?

A Yes, there were prints shipped to out of state.

Q Do you know at whose request they were shipped?

A At the request of the AFL-CIO, with addresses supplied to us.

Q And they were shipped by whom?

A In that case they were shipped by the film laboratory, directly from the laboratory. As a matter of fact, I believe the invoice shows the shipping destinations.

Q By the laboratory?

A Yes, sir.

* * *

DIRECT EXAMINATION

103 THE COURT: What is your name and address?

THE WITNESS: Frank A. Nastick, 13000 Payson Street, Rockville, Maryland.

BY MR. STRUPP:

Q Will you state your position, please?

A I am an accountant for Norwood Studios.

THE COURT: You are what, an accountant?

THE WITNESS: An accountant, yes, sir.

BY MR. STRUPP:

Q You are employed by them on a full-time basis?

A Yes.

Q How long have you been so employed by them?

A Since March 1959.

104 **Q** Does that include the period during which these transactions occurred that we are talking about?

A Except the first one, the N-143.

* * *

BY MR. STRUPP:

105 **Q** Mr. Nastick, I show you Petitioner's Exhibit No. 7 and 8 for identification.

(The documents mentioned were marked for identification as Petitioner's Exhibits Nos. 7 thru 12.)

MR. STRUPP: Can you describe for us more fully
106 what these are?

THE WITNESS: Yes, Petitioner's Exhibit No. 7 is an invoice from Capital Film Laboratories which bills us, bills Norwood Studios for the first trial answer print and related sound services.

Petitioner's Exhibit No. 8 is an invoice of Capital Film Laboratories to Norwood Studios for 12 sound "A" and "B" release prints and shipping charges, as these were shipped out of state.

BY MR. STRUPP:

Q Do you know to which of the contracts this relates?

A Yes, this relates to Contract N-143, "It's Good Business."

Q Which is Petitioner's Exhibit No. 1?

A Correct.

THE COURT: The first one you mentioned was the work prints?

THE WITNESS: First trial print.

THE COURT: And the other was the final?

THE WITNESS: The final release prints.

THE COURT: And that is for the work of doing what?

THE WITNESS: The release prints? This is for the printing of the release prints, printing and shipping them out to various people as the union required us to do.

THE WITNESS: The material has been furnished by Norwood Studios.

THE COURT: Oh, I see. How about the film? I mean the thing in which the picture is put.

THE WITNESS: It is in the price of the release print, itself. The raw stock is included in the price of the film.

THE COURT: All right.

* * *

BY MR. STRUPP:

112 Q Mr. Nastick, I show you Petitioner's Exhibit Nos. 9, 10, 11 and 12, for identification and ask you to explain what they are.

A Petitioner's Exhibit No. 9 is an invoice from the Capital Film Laboratories to Norwood Studios, which invoices Norwood Studios for the answer print, the 50 release prints and various sound services in relation to Contract N-211--21.

Petitioner's Exhibit No. 10 is an invoice from Capital Film Laboratories to Norwood Studios, invoicing Norwood Studios for the answer print and release prints in relation to N-320 Contract.

Petitioner's Exhibits 11 and 12 are invoices from Capital Film Laboratories to Norwood Studios, which bills Norwood Studios for the release print and answer print for Contract N-221. Also Exhibit No. 11 is the release prints which were shipped out of town subsequently.

* * *

124

RALPH W. COLLETT

was called as a witness for petitioner, and, after being first duly sworn, was examined and testified as follows:

* * *

BY MR. STRUPP:**Q** Mr. Collett, what is your occupation?**A** I work for Norwood Studios in the distribution department.**Q** Distribution department?**A** That is right, sir.**Q** And what is that work?**A** It is for the distribution of the AFL-CIO films that we are now primarily handling and other contracts for servicing and distribution of films.**Q** How long have you done this work?**A** Since 1959.**Q** What are your duties in connection with this distribution?**A** At the present time I am more or less --125 **THE COURT:** He said he was connected with those contracts.**THE WITNESS:** At the time of the contracts?**BY MR. STRUPP:**

Q Yes.

A I was shipping the films to the T.V. Stations throughout the country, as directed by AFL-CIO.

Q What were the mechanics of this job? How did you go about doing this?

A Well at the time that the release prints were completed, the AFL-CIO furnished us with station sheets and mailing labels and return labels and gave us a date when these films were to be on the air and these were shipped on a weekly basis to each and every one of these TV Stations that we are required to ship -- over 150 stations.

Q I show you these documents, consisting of --

* * *

--consisting of 31 sheets, and I ask you whether you can identify these.

* * *

126 THE WITNESS: Yes, sir, these are TV Station records which are furnished to us by the AFL-CIO giving the station, the address, the starting date and the day that the film is supposed to be on the air and the sequence in which the films are to be played on a weekly basis. From these sheets we formed our own shipping sheets on a daily basis and carried these throughout the entire series to the stations.

THE COURT: Where did you send the shipping --

THE WITNESS: These were shipped to the various TV
Stations throughout the country and even overseas.

THE COURT: Through your office?

THE WITNESS: Yes.

* * *

129 Q How did you go about making these entries? From what information or what sources?

A This, here, as I say, is a station sheet that is furnished to us by the AFL-CIO and these, we have numerous more of these because we were furnishing over 150 some stations. Here I have just a portion of these sheets. From these sheets we transferred these onto a daily shipping record by pulling off the various ones shipping on a certain date of the week, in order to at least allow 10 days shipping time for the date of these films to reach the station on time. So from this information that was being transferred from our master sheet, we then, in turn, were furnished shipping labels by the AFL-CIO, which was a mimeographed or some type of printing method they use for making these labels and they furnished these labels to us ahead of time, enough to carry us through the entire series.

* * *

130 Q I will show you this case and ask you to identify that.

A This is a shipping fiber carton that this particular film or any others in this size, which are all standard size, they would be put into these and an outgoing label which was pre-addressed by the AFL-CIO and we, in turn, put the postage on it and on the reverse side we also furnished postage for the station to turn this card upside down with no burden on our part. It has the postage involved to return these films back to the studio.

THE COURT: When you got them back, what did you do?

THE WITNESS: These were taken out of the cases and then an inspection service -- each one of these films was re-examined and ready to go out again to the next station. Being that we had 150 some stations to serve and the first 50 prints we had immediately went out, we had to keep them going at all times.

THE COURT: Oh, you sent them again.

* * *

BY MR. STRUPP:

131 Q Can you explain a little further the mechanics of shipment? You received the completed release prints from the laboratory in this type of container such as Petitioner's Exhibit No. 6, is that correct?

A That is right.

We would also be furnished with these cases --

Q By whom?

A By the laboratory. With these cases and these films which identified the cans by putting on these furnished labels by the AFL-CIO, putting them in these shipping cases (132) and shipping them out according to our scheduled TV Stations booking sheets and they were then -- postage was applied and they were mailed out and picked up by our local mail delivery and pickup service at the back door and were sent on out.

Q Who picked them up at your back door?

THE COURT: He said the mailman.

THE WITNESS: The Post Office.

MR. STRUPP: I have no further questions.

* * *

CROSS EXAMINATION

133 BY MR. WIXON:

* * *

140 **THE COURT:** Where did you get the stamps? Who gave them to you?

THE WITNESS: They were furnished by the company.

THE COURT: How about the stamps of return?

THE WITNESS: We purchased those, too, sir. That was part of the stipulation that we would put the stamps on the back as well as on the front because they didn't want the TV Stations to incur any expense, because these were public service films.

* * *

149 Q Tell me -- I have not seen the film and neither has Judge Morgan -- is there anything on the film, itself, which identifies it as being connected with any particular person or organization?

A Well, the film, itself, has a tail-end leader, which is an AFL-CIO seal, which is their emblem.

Q What does that say, sir? Do you know?

A If I remember correctly, I think it is produced or presented to you by the AFL-CIO or connected with or in conjunction with or something along that nature.

* * *

* * *

171

CROSS EXAMINATION

BY MR. WIXON:

* * *

176 A What would we have to have to make additional prints?

Q What would you have to have to make additional prints?

A We'd have to have what we call, pre-print material which would be optical sound tracks.

You'd have to have negative material.

An analogy would be like making another suit. You have your pattern and you order another suit, so he takes out your pattern and makes another suit.

That's what you have to have in order to make the film. You have to have a pattern.

Q Mr. Burrowes, if I took a 35 mm picture, black and white, I'd have a negative and if I processed it myself I'd have then--well, I say, a negative. I'd have a piece of film that was exposed.

After I'd process it, I'd have a negative. Then I'd take the negative and I would take a piece of printing paper and expose it to light and get a final print; but I would still retain the negative so that I could 177 make a hundred more so long as it held up.

Now, would you have to have such a negative in order to make additional release prints of these particular films?

A Well, we would have to have some kind of printing material.

Q Would you have a negative?

A It could be a negative.

It could be a fine grain--you'd have to have material like fine grain masters. Have to have an optical sound track--various things that are required to make a release print.

Q Well, was there such a thing as a negative?

A Yes.

Q What happened to the negative?

A Well, the negative, at times, was consumed from the printing of the materials.

In other words, after you have struck so many prints, the negative would probably be valueless and a new negative would have to be made.

I can't tell you exactly the status of all the negatives made on these shows.

* * *

183 Q You did get an acceptance, or you did not, sir?

A Yes, we--I was--I am assuming we got the acceptance when we got paid.

Q What I meant was, I was trying to inquire, was whether you got a letter or some document.

A I have a verbal okay, or a letter of some kind.

Q How was it handled? I certainly have no idea--as to your answer, was there any written acceptance?

A Yes, someone would have said, "yes, go ahead. We accept that".

Q When you say, "Go ahead", what do you mean, sir?

A Well, they would have said that we--"We accept these materials". "We accept the things that you've done".

Q Well, would that be in ordinary sequence, something like this?

Norwood Studios went on location with a number of pictures, came back and made up the necessary work prints and all the rest of it, that was required, to work toward the end of getting a final result which would be a film strip which could be projected.

Am I correct at that point, sir?

184 A Well, the--we would be working toward a--

Q --a final result which was from the standpoint of the practical showing of the item, a release print?

A We would be working toward a final result of delivering to the client what we had agreed to do for him.

Q That's right, sir.

Now, at some point along that line, according to what I understood you to say, you got orally, in all probability, some type of acceptance,

as called for under Article 7.

I am simply trying to identify at what point somebody said, "This is accepted", or "Your work is accepted" or "you have done everything you are required to do here properly".

I mean, something of that type.

A This is a service contract and the client would approve various stages of this. He would accept, let us say, the original photography. He would see the rough film as it came out of the camera projector. He would say, "All right".

He would see a work print. He would accept that and these stages went on until he finally accepted all of the materials that were called for under the contract.

Q Never, according to your recollection, was there any single acceptance? It was continuous all the way through since the AFL-CIO was involved in determining that your work, as it progressed, was satisfactory. Am I correct, sir?

A Well, I believe that they approved the--I would say
185 they approved the stages of completion as we proceeded.

Q Yes.

Now did AFL-CIO ever accept any release prints?

A Did they accept the release prints?

Q Yes, sir--say to you, "Mr. Burrowes" --of course, you understand I make this up, but I'm trying to get the thought across.

A Yes.

Q "Mr. Burrowes, these release prints are all right. We accept them".

Did they ever say anything like this?

A Well, they normally--they normally looked at the answer print. They said, this is a --

THE COURT: You can say "yes" or "no" or qualify your answer.

THE WITNESS: I am trying to--is he referring to this specific contractor or these?

THE COURT: Well, he didn't--either one. It didn't make any difference. Generally, he wanted to know when you finish the film and sent it out to where you--before or sometime, he said that final film is all right. Do you remember anything like that?

THE WITNESS: Yes, when the answer print was --

THE COURT: He's talking about the film.

THE WITNESS: The release print?

186 THE COURT: Yes.

THE WITNESS: Normally speaking, the contract, if it called for delivery of prints we called the clients they had been delivered in accordance--notified the client they had been delivered in accordance with the contract. They wouldn't sit down and screen fifty release prints.

BY MR. WIXON:

Q They never saw the release prints? AFL-CIO never saw the release prints?

A Well, sofar as I know --they might.

Q Beg your pardon?

THE COURT: He said, "They might".

A They might have. There are hundreds of these under contract and they might have seen a release print.

Q Well, did you ever get an acceptance of the release print?

THE COURT: He says he doesn't know. After they finished them, they sent them out.

A If the contract called for us to deliver the release prints we delivered them.

Q Yes, I know, I understand.

A We notified the firm we delivered the release prints. They were designated wherever they were sent by the union. I assume we completed our obligation at that point.

* * *

191

PHILIP MARTIN, JR.

was recalled as a witness for the Petitioner and testified as follows:

* * *

BY MR. STRUPP:

* * *

210 MR. STRUPP: What do Capital Laboratories use in these contracts?

MR. WIXON: I object.

THE COURT: Well, I think we are concerned more with-- in this, what they use, more in this particular instance.

MR. STRUPP: That is what I'm asking.

THE COURT: I overrule the objection.

What did they use?

THE WITNESS: They used the positive film and they would pay .01 less either two or three per cent for payment in cash.

MR. WIXON: I object, Your Honor. He's talking about what Capital Film Laboratories would do.

I don't think he is competent to testify about that now.

THE COURT: I agree with you. I don't think so, except we are talking about what the market is.

You had, though, purchased during this time, for your own use?

THE WITNESS: The similar material Capital furnishes and they must buy -- if they are using negative stock or positive stock, they have to purchase from the same people we do.

211 There is no discount on anything, unless you pay cash.

THE COURT: Without the discount, it is one cent a foot?

THE WITNESS: That is correct, sir, on a positive stock.

They hold the line. There is no difference in the price.

Would you like me to explain?

THE COURT: No.

* * *

213 MR. STRUPP: Your Honor, I submit, again, Mr. Martin is qualified to testify on the value.

THE COURT: He has already testified.

MR. STRUPP: We haven't asked him the question relative to this case. He has testified as to the value of these type of films.

I am going to ask him, with Your Honor's permission, as to the value of the specific release prints we are talking about in the present case.

THE COURT: I will rule, Mr. Wixon -- I suppose you object to him as an expert.

MR. WIXON: I will enter the objection. I thought we were going into all this with the idea of qualifying.

We do have prices all over the place. I move to strike all of that at this juncture.

THE COURT: I am not going to strike it. It may go in to proving whether he is an expert or not. I am going to hold you have a right to ask him about the specific material here involved in this contract, but I am going to overrule your objection, Mr. Wixon. I think he is

qualified to testify how much the raw material costs.

* * *

220 BY MR. STRUPP:

Q Do you know?

THE COURT: He asked what, in your opinion, is the value of the raw material, before it was processed here -- just raw, like you'd --

A Positive raw material at one cent a foot and the negative raw stock .023 per foot.

Q Now, what is it worth after it has become a release print?

THE COURT: I don't think he's qualified.

MR. WIXON: I have no objection to that question being asked.

THE COURT: All right.

BY MR. STRUPP:

Q Is there any change?

A Yes, there is a change.

Q What does the change do to it?

MR. WIXON: I object, Your Honor.

Now, we have a question never answered, superimposed by another question.

THE COURT: Let him answer.

You asked him --

221 MR. WIXON: No, no--please read it from the record.

(Question: "What is it worth after it has become a release print"; read by Reporter.)

BY MR. STRUPP:

Q The question is then, what is it worth as a release print?

A In the case of the contracts, it is what is stated on the bills.

Q On whose bills?

A From Capital Film Laboratories.

Q That is different from the figure you gave before?

A The only figure I gave before was the value of raw stock.

I did not give the value of a completed release print per foot.

Q But there is a difference?

A Certainly, there is a difference.

Q And, why?

A Because it has to be printed. It now has a latent image on it.

The latent image must be developed. When it is developed and certain other treatments are done to it, it becomes a release print. Up to that point it is raw stock.

*

*

*

226 THE COURT: I am going to rule that it is my recollection he did, and he testified as to the value both before and after the processing.

He testified after the process is what the laboratory cost him.

Now that's my--Mr. Witness, am I wrong about that?

THE WITNESS: No, sir, that's correct.

THE COURT: That is exactly what he testified.

* * *

230

CROSS EXAMINATION

BY MR. WIXON:

Q Mr. Martin, were you required to buy anything in order to carry out these contracts?

MR. STRUPP: What was that--buy?

MR. WIXON: Buy anything in order to carry out these contracts.

THE COURT: Before or after. Whether or not he had it in stock, he bought it.

A Yes, some items.

Q Tell me, sir, what items did you buy, if you can recall?

THE COURT: Before or after, you mean?

231 BY MR. WIXON:

Q What items were you required to use up or consume in respect of the carrying out of these contracts, whether by way of film, by way of special pieces of equipment, whatever it may be.

* * *

Yes we were.

* * *

THE COURT: Tell what you were required to use up,
either before or after.

A Negative raw stock.

Q Raw stock?

THE COURT: Now, what do you mean--film?

THE WITNESS: Yes, sir, negative, as I explained before.

THE COURT: Yes, sir.

Q You remember how much raw stock you bought, in money?

A No, sir, not unless I referred to the records.

Q Would it refresh your recollection if I mentioned the figure
\$20,986.51 in raw stock for these contracts?

A I don't recognize the figure, and I wouldn't care to testify
that that is correct.

Q Would you have consumed or used a considerable amount of
raw stock in these productions?

A Well, we certainly would have used some and we would
232 have used enough in order to accomplish the photographic
coverage.

As to what the ratio would be, I can't tell you because it
would vary from picture to picture.

* * *

243 THE COURT: By the way, may I ask--what is the length of these films?

THE WITNESS: 508 feet. Exactly thirteen and a half minutes.

* * *

250 JAMES A. BARKER

was called as a witness for the Petitioner, having been duly sworn, testified as follows:

* * *

BY MR. STRUPP:

* * *

Q State your occupation, please, Mr. Barker?

A I am President of Capital Film Laboratories, Inc., a firm engaged in the business of processing and duplicating 16 mm and 35 mm motion pictures plus certain additional services for the film producers and distributors.

* * *

255 Q What materials go into the making of release print, if you know?

* * *

256 A In this, sir, these are 16 mm black and white prints. The

raw stock--that is the unexposed duplicating film is purchased by my company from either the Eastman Kodak Company or the DuPont Company and the price is--today it's .0085, .00875 per foot.

I think at the time this contract was made it was .0085 per foot.

In other words, little less than a penny.

So, this is one ingredient.

THE COURT: Now, that --

THE WITNESS: That is the price per foot, sir.

THE COURT: This included discount for cash or in full?

THE WITNESS: This is after discount for cash; so this

is --

THE COURT: What it cost you?

THE WITNESS: -- what it cost us. That is correct.

The additional ingredients in the release prints are the labor performed, plus depreciation on machinery and other necessary overhead items, according to our present cost accounting calculations--

* * *

257 Q Do you sell raw film at any time other than what you just described?

A We do sell raw film for one purpose. That is, motion picture producers use raw unexposed film for leader-- leader being a piece of white film you tack onto the head of the picture negative and on

this white film you can make written identification of what that motion picture is.

So, for this purpose, we do sell raw stock in the same form we have received it from the manufacturer and we sell it for one cent a foot--the quantity is not large.

* * *

THE COURT: How much--what's the volume of purchases of raw--undeveloped materials? How much do you buy?

THE WITNESS: Well, sir--

THE COURT: You personally purchase any?

THE WITNESS: Not "Him Barker" but our company does, sir.

THE COURT: You know what this would be?

THE WITNESS: Yes, I certainly do.

258 Our purchases 16 mm black and white film are approximately 27, 28 million feet per annum.

THE COURT: What supervision do you have, if any, over this purchase?

THE WITNESS: The Purchasing Department reports directly to me and I see that their inventory policies are adequate so we maintain proper stocks.

I advise them on--or I instruct them, at times, to purchase from

DuPont rather than Eastman for a variety of reasons.

The main--well, but as far as the day to day operations go, of buying the raw film; no, I'm not involved.

THE COURT: What opportunity have you to know what is the market price of this?

THE WITNESS: Of the raw film?

THE COURT: Yes.

THE WITNESS: Well, I get into this very closely, sir, because the cost of raw film to us is one of our major expenses. It is--in this country, the price is identical between the two major suppliers and virtually the only suppliers, DuPont and Eastman, and the price I quoted you .00875 would be the same from either supplier and there's no chance of quantity decrease from those suppliers. We tried it.

* * *

259 Q Have you ever sold raw film to Norwood?

A Yes, sir, the white leader, I mentioned previously.

Q For what price, do you recall?

A I don't recall specifically. I'm sure it's the one cent a foot price I quoted.

* * *

260 CROSS EXAMINATION

BY MR. WIXON:

Q I think you said you were the one or the person responsible for determining the amounts to be charged from the company's standpoint, which you had--

A Yes, sir.

Q --to the Norwood Studios, for the work you are going to do. Am I correct, sir?

A Yes, sir.

Q The price you gave or determined to be the price for the work to be done for Norwood Studios, was that the same price anyone else would have gotten?

A For comparable volume, yes, sir.

The price that I gave Norwood Studios on this AFL-CIO series was--on the released prints was .0195 per foot and that is--in our belief, is a low price for--your average price, 16mm black and white printing is about .028 or .029 per foot, so this was almost a cent lower than our average price.

The reason we were willing to extend that price to Norwood was this was a weekly series so in a sense it gave us backlog of business. We knew the show would be there every week for duplication so it
261 was a very desirable type of business for my company to have and anyone else who came through with a weekly series, I certainly would give him the same price, yes, sir.

* * *

Q If one came over there with one 16 mm film, which you were going to process to obtain the release print, what would have been the price if the length of it were the same which Norwood Studios had?

A And the number of prints were the same?

Q No, just one.

A Just one?

Q Yes.

A They pay--prices in our business are based on how
262 many prints you are going to buy at a given time.

If Norwood bought a single print, the price would be higher. If they bought five or sixty prints, they were doing--that is when the .019 came into press--if they bought a single print it would be a much greater price.

In our price list here, for example, let's say that a customer came in who had been doing twenty or \$30,000 worth of business a year with us and came in and said, we'd like a single print of this 16mm black and white film; if we had not published that print before, the first subject would be what we call the answer print.

There is a lot of study involved to determine the optimum exposure in shooting--doing each scene in the picture, a lot of high-skilled labor, high-priced labor.

The price .054 per foot--if they wanted one additional print the price would be .041 per foot, or if this show had been printed previously and was in our vaults and they sent in a re-order for a single print it would be .041 per foot.

If they came in and wanted to buy 75 prints, the price would be .028 per foot. If they wanted to buy 500 prints we would probably give them a lower price on special negotiation.

Q You use the word "answer print", sir. What did you mean by "answer print"?

A An answer print is the--is also referred to as a first trial composite print. It is the first positive copy from a finally 263 formed and finished 16mm or 35 mm picture negative.

Q In other words --

A The term "answer" came into being because it is, in a way, an answer to all the work that's gone before, all the production work, sound recording, editing.

Q Do I understand, sir, that when you get an answer print you have got the final result?

A That's right, sir.

* * *

THE COURT: * * *

What do you mean by "final result"?

THE WITNESS: The production company goes out in the field with their cameras and sound recording apparatus or in the studio and oh--oh, for a fifteen minute film, for television the final length of which is only going to be 500 feet--

THE COURT: That is the negative, isn't it?

THE WITNESS: The negative.

THE COURT: That is the negative in the machine--in the camera.

THE WITNESS: Yes, sir, but in order to arrive at 500 feet, the producer will likely shoot oh, perhaps, as high as 5,000 or
264 more feet of film in the camera.

Then all of that footage--a quick copy is made of all that footage which we call a work print and the negative is stored in the vault so as not to damage it.

THE COURT: That is the negative that came out of the camera.

THE WITNESS: That's right, sir.

Then the work print is used.

THE COURT: The work print is positive.

THE WITNESS: Positive. Our typical price is about four and a half cents a copy.

I think, if I recollect, our price to Norwood was four cents a foot.

Then the producer, with his editor, takes this 5,000 feet of work print--

THE COURT: Yes.

THE WITNESS: According to the script, and their wishes, edit it down to the final prescribed length or in the case of a fifteen-minute show, about 500 feet, so they have removed the additional footage and discarded it.

Then from the work print with the scenes in it they go back to the camera negative and carefully select the scenes they have selected to use in the final film.

Those scenes are carefully removed and --

* * *

265 THE COURT: All right, then, they match it.

THE WITNESS: There are many other things.

THE COURT: How about sound?

THE WITNESS: Music sound recording, narration--all these things are brought together and you wind up with a final soundtrack which is also a blend of sound effect, narration, dialogue taken during photography and then we wind up ultimately in the laboratory with a final cut negative from the 5,000 feet we got a nice 500 feet that has been thought about very long and arduously and a soundtrack to go along with it and from this camera negative and this soundtrack we make--well, we

make intermediate printing materials first, so as not to damage that original camera negative; or we may make an answer print from the camera negative from the--as the first step.

Q I think in this series that's what we used to do.

THE COURT: What happens to the answer print?

THE WITNESS: What happens to the answer print?

266 THE COURT: Yes.

THE WITNESS: The producer if he likes it, he shows it to his client. If the client likes it, the show is approved and the producer gives the order to make the required number of copies. If the client doesn't like it, then the producer has to change it and go back through these steps and change a lot.

BY MR. WIXON:

Q And get another answer print?

A Get another answer print, yes.

Q Until you get, finally, to the point one answer print is the acceptable one and that part of the negative.

A That is right.

* * *

270 Q It has been testified that your company, as I recall it, in some instances, did some of the mailing of some release prints

271 to some of the designated television stations.

A Yes, we did.

Q From whom you get your order to do that?

A Well officially we got our instructions on this from the production, but the instructions came from their client, the AFL-CIO and in some cases the instructions may have come directly from AFL-CIO to our offices but it was a three-way relationship here.

Norwood and Capital were joining together to serve the AFL-CIO, but the basic contractual sense, our dealing was with the producer and not their client.

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FILED
JULY 22, 1963
DOCKET NO. 1860

STIPULATION

It is hereby stipulated and agreed between the District of Columbia and the above-entitled petitioner, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to object to the introduction in evidence of such facts on the grounds of immateriality or irrelevancy.

1. Extra prints made in connection with Contract N-211, for which a charge of \$1,176.30 was made by the petitioner, are not included among the items listed in paragraph 7, Page 1A of Petitioner's brief.
2. The length of films in the "American at Work" series is 508 feet each or 13 1/2 minutes each. (Tr. 243, 30).
3. The "Americans at Work" series contained 104 shows or subject matters; these were covered by contracts N-211 and N-320 (Tr. 30-31).
4. Attached hereto, and marked respectively as joint exhibits 1-A and 2-B, are invoices from Capital Film Laboratories, Inc., as follows:
 - 55 invoices, part of Contract No. N-211.
 - 51 invoices, part of Contract No. N-320.

These invoices together with those previously admitted in evidence, constitute all of the invoices from Capital Film Laboratories, Inc., in connection with contracts numbered N-211 and N-320.

/s/ Henry E. Wixon

/s/ Werner Strupp

Attorney for Petitioner

Assistant Corporation Counsel, DC

Attorney for Respondent

The one hundred and six (106) invoices, referred to in numbered paragraph 4 of the Stipulation filed on July 22, 1963, with the District of Columbia Tax Court are not, because of their length, reproduced herein. Petitioner and respondent further stipulate that the invoices show that respondent paid Capital Film Laboratories, Inc., \$62,165.50 for developing and processing costs and film requirements in connection with contract N-211 and \$54,009.46 for developing and processing costs and film requirements in connection with contract N-320.

FILED

AUGUST 1, 1963

DOCKET NO. 1860

FINDINGS OF FACT AND OPINION

The assessing authority of the District of Columbia assessed the petitioner sales taxes in relation to the production of television and moving pictures. The petitioner here protests the assessment on the grounds (a) that a small portion of the production activity and virtually none (1) of the use

(1) Most, if not all of the films were used by moving picture houses and television stations located outside the District.

of films took place within the District of Columbia; and (b) that the amount of material actually used in the production of the films represented less than 10 per cent of the contract price.

Findings of Fact

1. The petitioner is a corporation with its principal office at 926 New Jersey Avenue, Northwest, Washington, D. C.
2. (a) The petitioner is engaged in the business of the production of television and moving pictures.
 - (b) The production of television and moving pictures involve artistic endeavor, the services of research, writing, photographing, editing, composing narration, selecting sound and sound effects, composing music, development of the negative and the printing therefrom of the "work" print, "answer" print and the examination and correction thereof, and finally the "release" print.
 - (c) The aforesaid production requires the services of authors, both of narration and music, musicians, directors, cameramen, soundmen, electricians, film editors, sound cutters, projectionists and narrators.
 - (d) In the aforesaid production there are used inconsequential elements or articles of tangible personal property of little actual value, namely, photographic negative film, the first print therefrom, generally called "work print", the "answer print", so called because it is the answer

to all which has been done before, such as production, sound recording, editing, music and the like, and has the same relation to production as a printer's proof has to printing; and finally the "release print". After being used the "work print" and the "answer print" have no further value or use, and are discarded or destroyed.

(e) The foregoing elements of television and moving picture production were present in the production involved in the hereinafter mentioned contracts between the petitioner and the American Federation of Labor and the Congress of Industrial Organizations, hereinafter called "AFL-CIO".

3.(a) On June 5, 1958, the petitioner entered into an agreement with AFL-CIO for the production of a motion picture tentatively entitled "Your Community", and numbered N-143, a copy of which is appended to these findings of fact as Appendix "A". The motion picture was subsequently entitled "It's Good Business".

(b) On July 16, 1958, the petitioner entered into an agreement with AFL-CIO for the production of a series of motion pictures for television release tentatively entitled "Labor Parade", later entitled "Americans at Work", and numbered N-211, a copy of which is appended to these findings of fact as Appendix "B".

(c) Because of consideration of, or insistence by the musician's union, the petitioner and AFL-CIO on August 29, 1958, entered into a supplemental agreement relating to the music provided in the agreement for the production of the series of motion pictures, entitled "Americans at Work" (N-211), which supplemental agreement provided that the music in the original agreement, which is called "library music" be changed to original music, and which supplemental agreement was numbered and designated "N-211, Music", a copy of which is appended to these findings of fact as Appendix "C".

(d) On or about July 6, 1959, by letter from the Director of Public Relations of AFL-CIO the contract for the production of the series of motion pictures, entitled "Americans at Work" (N-211) was continued for an additional thirteen weeks, which letter was numbered "N-211 Supp", a copy of which is appended to these findings of fact as Appendix "D".

(e) On November 24, 1959, the petitioner entered into an agreement with AFL-CIO for the production of a series of fifty-two 13 1/2 minute, 16 millimeter, black and white sound motion picture shows, entitled "Americans at Work", and numbered N-320, a copy of which is appended to these findings of fact as Appendix "E".

(f) The petitioner was requested by AFL-CIO to furnish, and did furnish extra prints provided in the agreement numbered N-211.

(g) The petitioner was requested by AFL-CIO to furnish and did furnish photographic coverage of the latter's president, George Meany, at a labor union convention of plumbers. The agreement for that service was numbered N-215.

(h) The petitioner was requested by AFL-CIO to furnish, and did furnish what is known as T.V. spot service in respect of the appearance of the latter's president, George Meany. The agreement for that service was numbered N-221.

4. In accordance with the agreements described in subfindings (a), (b), (c), (d) and (e) of Finding No. 3, the petitioner delivered or caused to be delivered the release prints, for which provision was made in the agreements, to various moving picture and television establishments throughout the United States. In most instances, after display of the prints they were returned to the petitioner and again sent out to other moving picture and television establishments.

5. For and in consideration of the performance of the aforesaid agreements with AFL-CIO the petitioner received as payment therefor the amounts and in respect of the agreements as follows:

<u>Title</u>	<u>Agreement Number</u>	<u>Date of Agreement</u>	<u>Contract Price</u>
"It's Good Business"	N-143	6/5/58	\$35,322.00
"Americans at Work"	N-211	7/16/58	235,241.00
"Americans at Work"	N-211	8/29/58	59,395.96
Music			
"Americans at Work"	N-211	7/6/59	78,413.66
"Americans at Work"	N-320	10/13/59	383,552.00
"Americans at Work"		<u>Date of Invoice</u>	
Extra Prints	N-211	<u>12/9/58</u>	1,176.30
Photo Coverage - George Meany at Plumbers Convention	N-215	9/15/58	606.10
T. V. Spot - Meany	N-221	10/27/58	1,430.13
		Total	<u>\$795,137.15</u>

6.(a) On November 2, 1962, the assessing authority of the District of Columbia assessed the petitioner deficiencies in sales tax for the period from June 1, 1958 through January 31, 1961, in the total sum of \$14,731.02, being 2 per centum of \$736,551.17, determined by the assessing authority as the correct basis, after giving credit for the amount of sales taxes paid by the petitioner on prints furnished by Capitol Film Laboratories, Inc. as will hereinafter appear.

(b) On December 13, 1962, the petitioner paid the aforesaid sales taxes to the District of Columbia.

7.(a) After scenes, episodes and music had been designed, composed and filmed the photographic negatives were delivered or sent to Capitol Film Laboratories, Inc. of Washington, D. C., which developed the negatives into what is called "the work print", and delivered the same

to petitioner. After the work print was cut, corrected and otherwise arranged by the petitioner's staff it was returned to the Laboratories which developed therefrom "the answer print", and delivered the same to the petitioner. After study by the petitioner's staff and consultation with the representatives of AFL-CIO and the latter's approval the answer print was returned to the Laboratories, which then made the final or "release print", which was sent to the various moving picture and television establishments throughout the United States.

(b) Capitol Film Laboratories in the invoices for its services in developing and furnishing the above described prints separated the physical or tangible personal property from the services performed and charged the petitioner a sales tax upon the former at the rate then current.

8.(a) The aforesaid agreements between the petitioner and AFL-CIO were personal service transactions.

(b) The tangible personal property supplied by the petitioner to AFL-CIO in carrying out the aforesaid agreements in its raw or blank state cost an amount, and was of the value not in excess of \$30,000.00.

(c) The raw or blank tangible personal property supplied by the petitioner to AFL-CIO in carrying out the aforesaid agreements had a sales price, and were of the value of less than 10 per cent of the amounts provided in the agreements to be paid by AFL-CIO, and which was actually so paid.

(d) The tangible personal property supplied by the petitioner to AFL-CIO was an inconsequential element in the transactions involved in the aforesaid agreements, and were a mere incident thereto.

9. This case was filed on January 31, 1963.

Opinion

The petitioning taxpayer here complains of a deficiency in sales tax assessed against it by the assessing authority of the District of Columbia, and measured by the amounts of money received by it from several transactions with the American Federal of Labor-Congress of Industrial Organizations, hereinafter called "AFL-CIO". The petitioner relies upon that portion of the District of Columbia Sales Tax Act found in subsection 1 (b) (3) of Section 47-2601 of the District of Columbia Code, 1961 Edition, which exempts from sales and use taxes "Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made".

Under Section 47-2620 the Commissioners of the District of Columbia are "empowered to make, adopt, and amend rules and regulations appropriate to the carrying out of this chapter and the purposes thereof". Acting under that section the Commissioners adopted regulations pertaining to the Sales Tax Act (Order No. 54-1415, June 22, 1954) in Section 202(b) of which the term "inconsequential elements" was defined as follows:

"(b) 'Inconsequential Elements'. - The Act exempts from the tax the gross receipts from professional, insurance, or personal service transactions which involve sales of tangible personal property as inconsequential elements and where no separate charges for such sales of tangible personal property are made. The phrase 'sales as inconsequential elements' shall be deemed to include any sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the sales price of the tangible personal property is less than 10 per cent of the amount charged for the services rendered in the transaction."

While somewhat ineptly drawn, it is clear that the Commissioners acting under the authority granted them ruled that the term "inconsequential elements" was to be considered relative or comparative, and was to be determined by consideration of the cost or value of the tangible personal property in its blank or undeveloped state in relation to, or compared with the amount received for the personal services.

The transactions here involved were the outgrowth of agreements, mostly written, but one or two oral, between the petitioner and AFL-CIO for the production of several motion picture and television programs or shows and one for services of arranging the photography of the President of AFL-CIO, while he was either attending or presiding at a labor union convention.

The production of the programs or shows involved the employment or use of services of many types. Those services consisted of, but were not limited to artistic endeavor, research, writing, photographing, editing,

composing, narration, selection of sound and sound effects, composing music, development of the negative film, and the printing therefrom of the work and answer films, and the examination, correction, editing and correlation thereof, and finally the release print. The production of the moving picture and television programs or shows requires the services of authors, both of narration and music, musicians, directors, cameramen, soundmen, electricians, film editors, sound cutters, projectionist and narrators, and several persons with imagination. The foregoing appears not only from the oral testimony of competent witnesses but from an examination of the copies of several contracts appended to the findings of fact herein. It is obvious, as the Court has found, that those agreements involved personal service transactions.

The only tangible personal property used in the production of the motion pictures was film of four classes or uses, namely, (a) film used in photographing the various scenes and sounds, called "the negative", (b) film used in the first positive printing from the negative called "the work print", from which "the answer print" was made after it was edited, cut and rearranged, and which was thereafter discarded, (c) "the answer print", which was something in the nature of a galley proof used in printing, and was shown to, and approved by the representatives of AFL-CIO, and edited and corrected where necessary, and thereafter discarded, and (d) finally "the release print" which was the only print delivered to the AFL-CIO or to its designees.

The contract price for the production of the motion pictures and other photographic services involved in the agreements between the petitioner and AFL-CIO, and which was actually received by the petitioner therefor was \$795, 137.15. The cost of all the blank film used in the production of the motion pictures, including that which was discarded and not delivered to AFL-CIO or its designees was not in excess of \$30,000, that is to say something less than 4 per centum of the contract price. No separate charges were made for the sales of tangible personal property used and delivered to AFL-CIO or its designees under the above mentioned agreements.

Since the agreements involved were personal service transactions and involved tangible personal property as inconsequential elements, and since no separate charge for the sale thereof was made, the transactions were exempt from the effect of the Sales Tax Act, and the assessment of the deficiencies here involved was illegal. Washington Times-Herald, Inc. v. District of Columbia, 94 U.S. App. D.C. 154, 213 F.2d 23; District of Columbia v. Washington Post Company, 98 U.S. App. D.C. 304, 235 F.2d 531. In the Washington Times-Herald case, at page 155, we find the following:

"* * *. The syndicates sold to the Times-Herald the right to reproduce one time the work of artists who make the drawings. They simply sold the professional and personal services of the artists whom they had under contract and in so doing transferred title to the mats, of inconsequential value, from which the drawings could be reproduced. The price was paid for the artists' work, i.e., for the right to reproduce the impressions on the mats, --not for the mats themselves. The newspaper bought the creation of the artist--not the material on which it was impressed--and the right to reproduce it. Without that right, the comic strips mats would be entirely worthless.

"The transactions in question are clearly exempt under § 47-2701, subd. 1(b) (3)."

For the reasons stated the Court holds as follows:

- (a) That a deficiency in sales tax for the period from June 1, 1958 to May 31, 1959, inclusive, in the amount of \$3, 786. 60, was erroneously assessed against, and collected from the petitioner; and is hereby cancelled.
- (b) That a deficiency in sales tax for the period from June 1, 1959 to May 31, 1960, inclusive, in the amount of \$6, 797. 66, was erroneously assessed against, and collected from the petitioner; and is hereby cancelled.
- (c) That a deficiency in sales tax for the period from June 1, 1960 to January 31, 1961, inclusive, in the amount of \$4, 130. 56, was erroneously assessed against, and collected from the petitioner; and is hereby cancelled.

(d) That the petitioner is entitled to a refund of the aforesaid taxes, with interest thereon at the rate of 4 per centum per annum from December 13, 1962, to the date of the payment of the refund.

Decision will be entered for petitioner.

s/ Jo V. Morgan

Judge

June 5, 1953

American Federation of Labor
and
Congress of Industrial Organizations
815 Sixteenth Street, N. W.
Washington 6, D.C.

The following represents a letter of commitment from Norwood Studios, Incorporated, to American Federation of Labor and Congress of Industrial Organizations for the production of a motion picture tentatively entitled "Your Community".

ARTICLE I

Scope and Performance

A. Norwood Studios agrees to make and deliver to AFL-CIO, a completed 16mm, color motion picture, with sound, in two versions as follows:

1. A 13 $\frac{1}{2}$ minute version in Black and White for TV release
2. A 24 to 27 $\frac{1}{2}$ minute version in color for non-theatrical release

* tentatively entitled "Your Community". The Picture shall be made in accordance with the Shooting Script furnished by Norwood, subject to the approval by the AFL-CIO (subject to possible later authorized changes therein by the AFL-CIO). The Contractor agrees to make minor changes in the visual and narration content of the Picture, without additional cost to AFL-CIO, if required by AFL-CIO as determined during reviews of the rough assembly and the final cut. It is mutually understood and agreed that any modification which reflects a change in the cost of the Production must be approved in advance in writing by an authorized representative of AFL-CIO. Norwood Studios shall perform

the original photography in accordance with the scene specifications listed in the Script, and shall provide additional footage, consistent with professional standards, of various angles and cover shots to enable freedom of selection in editing. Norwood Studios shall furnish a stock music score of good quality for the Picture. Norwood Studios shall perform the work required in the production of the Picture in accordance with the schedule listed below. It is mutually understood and agreed that an Authorized Representative of AFL-CIO, which Representative is (or will be) designated as specified in Paragraph B, below, shall approve each Stage at completion thereof, prior to the beginning of the successive stage or work.

STAGE I - Consultation:

A. Norwood Studios' representative shall attend a conference in Washington, D.C., with AFL-CIO officials, within one week after the effective date of this contract, to discuss the general aspects of this Production, as concerns script treatment, shooting script and preproduction planning.

STAGE II - Research on Location:

Norwood Studios shall make a study of location scenes to be shown in the Picture, and shall submit a report to AFL-CIO, within one week after completion and approval of the shooting script, listing recommendations and all pertinent aspects including the physical appearance of locations studied and other details on which successful production from the Script will depend. Specifically, the report shall also include findings and recommendations regarding persons to fill the roles designated as "leads" in the finished script.

STAGE III - Photography:

Norwood Studios shall expose sufficient footage on location in order to avoid the necessity of returning for additional shooting due to shortages of coverage or inadequate production quality. The principal members of Norwood Studios production crew shall personally supervise all coverage. Other members of the production crew may be hired locally. A representative of AFL-CIO is to have the opportunity of seeing dailies as they are screened. On completion of photography, total amount of usable footage is to be made available to AFL-CIO for screening. Photography is to be completed within three weeks of approval of Stage II. Good quality of laboratory work is to be required on all processing.

STAGE IV - Preparation of Rough Cuts:

A rough cut of all footage shall be completed within four weeks of completion of photography (Stage III). A qualified writer is to make necessary adaptations at this and later stages. The rough cut with tentative narration shall be prepared for screening in Washington, D.C. Norwood Studios is to be prepared to make any necessary revisions of picture and narration on the basis of this screening.

STAGE V - Preparation of Final Cut:

A final cut incorporating any necessary changes shall be completed and screened in Washington, D.C., within two weeks after approval of the rough cut. In view of the major role of the narrator in this film, particular care is to be taken to obtain the most suitable voice. AFL-CIO shall approve the narrator to be used in recording on the basis of a review of several recommended voices.

x STAGE VI - Preparation of Voice-Interlocks:

Preparation of voice-interlock, incorporating any necessary changes

from Stage IV, is to be screened in Washington, D.C., within one week after approval of Stage V. Music score to be reviewed and approved by AFL-CIO in rough form.

X STAGE VII - Preparation of Answer Prints:

A. Answer print is to be completed and delivered within one week after approval by AFL-CIO of Voice-interlock. Delivery shall be made to an address designated by AFL-CIO.

B. AFL-CIO agrees to designate a representative to act as to specific matters.

C. Norwood Studios' performance of its agreement hereunder will be limited to writing and preparation of the shooting script, photography, editing, recording and laboratory services, production, narration, titles and opticals, music and effects, raw stock, *talent, research, materials, supplies, equipment, transportation for its property and personnel, and per diem for the latter, and other related services necessary to complete the Film.

D. Norwood Studios agrees to complete the performance hereunder within an estimated three (3) months after the effective date of this contract, barring strikes, acts of God, fires, accidents to key personnel, and legal acts of public authorities.

E. Upon completion of the motion picture, Norwood Studios will deliver to AFL-CIO or as instructed, the following materials, adequately packed, legibly marked, accompanied by a shipping list showing contents of shipment, name of producer, description of film, and contract numbers:

a. *One 16mm composite color answer print

One 16mm composite Black and White answer print

b. *Original cut 16mm Kodachrome color picture

Black and White *dupe negative cut 16mm picture

- c. Synchronized 16mm mixed narration, music and effect track negative of complete pictures.
- d. All out-takes, including unused picture original and duplicate work print.
- e. 16mm edited work print of complete pictures.
- f. Edited voice tracks, plus voice trims. (Voice will be recorded separately). NOTE: Lip sync dialogue tracks will be set up separately from narration voice tracks.
- g. The name and address of the musical subcontractor will be supplied by Norwood Studios for clearance purposes.
- h. 16mm sound effects tracks as used in complete picture.
- i. Three (3) copies of musical cue sheets and music rights license
- j. One (1) copy of RCA or Western Electric certification of sound royalty payments where applicable.

F. Norwood Studios will proceed with the production of the motion picture with all due diligence in accordance with the standards and customs of the motion picture industry until its completion and delivery to AFL-CIO. The finished Picture shall be the quality of a Class A motion picture as generally known in said industry, and must be acceptable to AFL-CIO. All work to be performed under this contract will be carried out by employees subject to collective bargaining agreements with a bona fide labor organization which is affiliated with the AFL-CIO.

ARTICLE II

PAYMENT

- A. As consideration for Norwood Studios' performance of the services

APPENDIX A - p 5

specified in Article I, the delivery and acceptance of the motion picture and other materials specified therin by AFL-CIO, and the granting of the rights by Norwood Studios as recited in Article V, AFL-CIO will pay Norwood Studios the lump sum of \$35,322.00. Upon certification and acceptance by the authorized representative of AFL-CIO, payments will be made in accordance with the following schedules:

X FIRST PAYMENT - \$11,774.00, upon signing of contract or written instruction by AFL-CIO to proceed.

X SECOND PAYMENT - \$11,774.00, upon the satisfactory completion of the required photography.

X THIRD PAYMENT - \$11,774.00, upon the delivery and approval by AFL-CIO of the answer print, the completed motion picture, and other materials as recited in Article I.

It is understood that any changes in content of the script or production schedule necessitating additional charges to the AFL-CIO must first be approved by the AFL-CIO before Norwood may proceed.

X B. Second and Third payments to be made upon presentation of properly certified invoices, in duplicate to AFL-CIO.

ARTICLE III

CREDITS

It is agreed that production credits shall be allowed in accordance with the policy standards of the industry and will be incorporated in the main title structure. The technical credit card shall also include the seal of the International Alliance of Theatrical and Stage Employees.

ARTICLE IV

WARRANTY

Norwood Studios warrants that it is the sole owner of all rights, title and interest of every kind, nature and description in and to the

Film produced hereunder exclusive of the music therein, and that it is the licensee of the rights to the music contained therein to sufficiently support the rights granted in Article V.

ARTICLE V

RIGHTS

Norwood Studios, Incorporated, does hereby sell, assign, grant and transfer to the AFL-CIO the full, free and unencumbered right, title and interest in and to the material produced by it under this contract, including the music on the sound track thereof, for whatever use and/or disposition the AFL-CIO may deem appropriate, but limited to non-theatrical, commercial and non-commercial, exhibition, television and reproduction rights, both foreign and domestic as concerns the music rights. It is understood and agreed that Norwood Studios retains for itself no rights in and to the materials produced hereunder.

ARTICLE VI

INDEMNITY

Norwood Studios further agrees to indemnify, save and hold harmless, the AFL-CIO, its officers, agents, servants and employees, from and against all claims, demands, suits, and liability of any nature or kind arising out of the alleged unauthorized use of any copyrighted or uncopied materials not furnished by the AFL-CIO.

ARTICLE VII

OWNERSHIP

It is understood and agreed that upon delivery and acceptance of the completed work, the entire ownership and all rights shall be vested

in the AFL-CIO. Norwood Studios shall not reproduce or use any of such materials, nor authorize any other person or organization to do so.

X

ACCEPTED:

AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS

BY

NORWOOD STUDIOS, INCORPORATED

BY

WITNESS: Donald J. Butler

Address 815 16th St., N.W.
Nash 6 Dc.

WITNESS: James H. Brown

Address 926 11th Ave. N.W.
Wash. D. C.

WITNESS:

Albert J. Zack

Address 815 16th St. NW
Washington 6 D.C.

WITNESS:

Betty Jo Wood

Address 803 Meyer Ave.
Silver Spring, Md.

July 16, 1958

102

American Federation of Labor
and
Congress of Industrial Organizations
815 Sixteenth Street, N.W.
Washington 6, D.C.

The following represents a letter of commitment from Norwood Studios, Incorporated, to American Federation of Labor and Congress of Industrial Organizations for the production of a series of motion pictures for television release tentatively entitled "Labor Parade".

ARTICLE I

Scope and Performance

Norwood Studios agrees to make and deliver to AFL-CIO, a completed series of thirty nine 13½ minute 16mm, Black and White sound motion pictures according to the following:

1. Norwood to supply:
 - a. Production supervision
 - b. Services of a script writer
 - c. Services of a camera crew consisting of:
 1. Director - Cameraman
 2. Assistant cameraman
 3. Grip - Electrician
 - d. All equipment necessary for normal silent photography - exterior and interior.
 - e. Negative raw stock on a five to one ratio
 - f. All developing, printing and edge numbering
 - g. Transportation consisting of camera car - station wagon properly equipped for personnel and equipment.
 - h. All operational costs associated with the above mentioned transportation equipment.

- i. All per diem expenses for camera crew
- j. All sound associated with "voice-over" technique consisting of services of narrator, music, mix, magnetic tape purchase, and transfer services.
- k. All film editorial services
- l. All titles consisting of permanent main and end and subtitles as required in each of 39 films
- m. All negative matching and synchronizing
- n. All optical effects made by printer method A & B roll
- o. Miscellaneous charges as follows:
 - 1. Local 644 I.A.T.S.E. Welfare Fund
 - 2. Small expendable supplies
 - 3. Petty cash
- p. One answer print of each film
- q. 100 release prints individually air expressed prepaid to any location within the continental U.S.A.
- r. Reasonable allowances for the following:
 - 1. Overtime payments to crew
 - 2. Additional transportation and associated expenses for *PMJ*
 - 3. Employment of "free lance" camera crews ~~and~~ distant locations

2. AFL-CIO to supply:

- a. Policy supervision
- b. Contact and liaison with member organizations
- c. Selection and approval of subject matter and resulting narrations and picture content
- d. Approved labels with addresses of selected TV stations for shipment of prints.

It is agreed that the films of this series will generally be constructed as follows:

1. A permanent opening title running 40 seconds
2. Several news-feature stories running $1\frac{1}{2}$ to 3 minutes
3. A special feature story running five to seven minutes
4. A permanent end title running 10 seconds

The sound track to consist of permanent and identifiable opening and closing music and other music selections as appropriate for the individual stories mixed properly with approved and synchronized "voice over" narration.

The Contractor agrees to make minor changes in the visual and narration content of the Picture, without additional cost to AFL-CIO, if required by AFL-CIO as determined during reviews of the rough assembly and the final cut. It is mutually understood and agreed that any modification which reflects a change in the cost of the Production must be approved in advance in writing by an authorized representative of AFL-CIO. Norwood Studios shall perform the original photography in accordance with the above specifications and shall provide additional footage, consistent with professional standards, of various angles and cover shots to enable freedom of selection in editing. Norwood Studios shall furnish a stock music score of good quality for the Pictures. Norwood Studios shall perform the work required in the production of the Pictures in accordance with the schedule listed below. It is mutually understood and agreed that an Authorized Representative of AFL-CIO, which Representative is (or will be) designated as specified in Paragraph B, below, shall approve each stage at completion thereof, prior to the beginning of the successive stage or work.

STAGE I - Consultation

Norwood Studios' representative shall attend a conference in Washington, D.C., with AFL-CIO officials, within one week after the effective date of this contract, to discuss the general aspects of this Production, as concerns script treatments, shooting scripts and preproduction planning.

STAGE II - Research on Location:

Norwood Studios' production director and writer will consult with persons designated by the AFL-CIO for the purpose of story selection, locations, scheduling story outlines and all other phases of production and distribution as required.

STAGE III - Photography:

Norwood Studios shall expose sufficient footage on location in order to avoid the necessity of returning for additional shooting due to shortness of coverage or inadequate production quality. The principal members of Norwood Studios production crew shall personally supervise all coverage. Other members of the production crew may be hired locally. A representative of AFL-CIO is to have the opportunity of seeing dailies as they are screened. On completion of photography, total amount of usable footage is to be made available to AFL-CIO for screening.

STAGE IV - Preparation of Rough Cut:

The rough cut with tentative narration shall be prepared for screening in Washington, D.C. Norwood Studios is to be prepared to make any necessary revisions of picture and narration on the basis of this screening.

STAGE V - Preparation of Final Cut:

A final cut incorporating any necessary changes shall be completed and screened in Washington, D.C. In view of the major role of the narrator in this Series, particular care is to be taken to obtain the most suitable voice. AFL-CIO shall approve the narrator to be used in recording on the basis of a review of several recommended voices.

STAGE VI - Preparation of Answer Print:

- A. Answer print is to be completed and delivered within one week after approval by AFL-CIO of Voice-interlock. Delivery shall be made to addresses designated by AFL-CIO.
- B. AFL-CIO agrees to designate a representative to act as to specific matters.
- C. Norwood Studios' performance of its agreement hereunder will be limited to writing and preparation of the shooting outline, photography, editing, recording and laboratory services, production, narration, titles and opticals, music and effects, raw stock, research, materials, supplies, equipment, transportation for its property and personnel, and per diem for the latter, and other related services necessary to complete the Series, and the supplying and shipment of release prints.
- D. Norwood Studios agrees to complete the performance hereunder as follows:

1. Production:

Issue #1 4 weeks after signing of contract
Issue #2 5 weeks after signing of contract
And on a weekly basis for the remainder of the 39 series.

2. Distribution:

Issue #1 5 weeks after signing of contract
Issue #2 6 weeks after signing of contract
And on a weekly basis for the remainder of the 39 series -
barring strikes, acts of God, fires, accidents to key personnel, and legal
acts of public authorities.

- E. Upon completion of the motion pictures, Norwood Studios will deliver to AFL-CIO or as instructed, the following materials, adequately packed, legibly marked, accompanied by a shipping list showing contents of

issue Pm Jr.

shipment, name of producer, description of film, and ~~account~~ number:

- a. One 16mm composite Black and White answer print
matched negative ^{16mm}
- b. Black and White ~~negative~~ 16mm picture
- c. Synchronized 16mm mixed narration, music and effect track
negative of complete pictures.
- d. All out-takes, including unused picture original and
duplicate work prints.
- e. 16mm edited work print of complete pictures.
- f. The name and address of the musical subcontractor will be
supplied by Norwood Studios for clearance purposes.
- g. 16mm sound effects tracks as used in complete picture.
- h. Three (3) copies of musical cue sheets and music rights
license
- i. One (1) copy of RCA or Western Electric certification of
sound royalty payments where applicable.

F. Norwood Studios will proceed with the production of the motion pictures with all due diligence in accordance with the standards and customs of the motion picture industry until its completion and delivery to AFL-CIO. The finished Pictures shall be the quality of news-feature motion pictures as generally known in said industry, and must be acceptable to AFL-CIO. All work to be performed under this contract will be carried out by employees subject to collective bargaining agreements with a bona fide labor organization which is affiliated with the AFL-CIO.

ARTICLE II

Payment

As consideration for Norwood Studios' performance of the services
APPENDIX B - p 6

specified in Article I, the delivery and acceptance of the motion pictures and other materials specified therein by AFL-CIO, and the granting of the rights by Norwood Studios as recited in Article V, AFL-CIO will pay Norwood Studios the lump sum of \$235,241.00. Upon certification and acceptance by the authorized representative of AFL-CIO, payments will be made in accordance with the following:

At the completion of each issue the payment of \$6,031.82
plus any authorized overages applicable to the issue.

It is understood that any changes in content of the scripts or production schedules necessitating additional charges to the AFL-CIO must first be approved by the AFL-CIO before Norwood may proceed.

ARTICLE III

Credits

It is agreed that production credits shall be allowed in accordance with the policy standards of the industry and will be incorporated in the main title structure. The technical credit card shall also include the seal of the International Alliance of Theatrical and Stage Employees.

ARTICLE IV

Warranty

Norwood Studios warrants that it is the sole owner of all rights, title and interest of every kind, nature and description in and to the Films produced hereunder exclusive of the music therein, and that it is the licensee of the rights to the music contained therein to sufficiently support the rights granted in Article V.

ARTICLE V

Rights

Norwood Studios, Incorporated, does hereby sell, assign, grant and
APPENDIX B - p 7

transfer to the AFL-CIO the full, free and unencumbered right, title and interest in and to the material produced by it under this contract, including the music on the sound track thereof, for whatever use and/or disposition the AFL-CIO may deem appropriate, but limited to domestic television as concerns the music rights. It is understood and agreed that Norwood Studios retains for itself no rights in and to the materials produced hereunder.

ARTICLE VI

Indemnity

Norwood Studios further agrees to indemnify, save and hold harmless, the AFL-CIO, its officers, agents, servants and employees, from and against all claims, demands, suits, and liability of any nature or kind arising out of the alleged unauthorized use of any copyrighted or uncopied materials not furnished by the AFL-CIO.

ARTICLE VII

Ownership

It is understood and agreed that upon delivery and acceptance of the completed work, the entire ownership and all rights shall be vested in the AFL-CIO. Norwood Studios shall not reproduce or use any of such materials, nor authorize any other person or organization to do so.

ADDENDUM

A. Norwood agrees to supply to the AFL-CIO any and all additional services and supplies that may be required by the AFL-CIO over and above the intent of this contract at prices consistant with its present price policy.

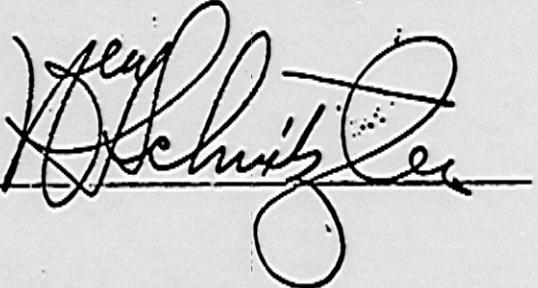
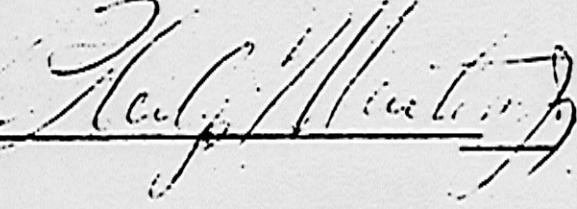
B. It is also understood that because of the duration of this contract, should intervening wage negotiations cause the labor costs of Norwood to be increased that the AFL-CIO will, upon examination and certification, adjust the contract price accordingly.

C. The AFL-CIO may cancel this contract after any 13 issue segment with four weeks notification and upon financial adjustment as follows:

1. The payment of the difference between weekly and annual wage scales for cameramen, assistant cameramen, grips, electricians, and film editors.
2. Adjustment of any cash payments due for overtime for the above crafts.
3. Adjustment of Welfare fund contributions applicable to these crafts.

NORWOOD STUDIOS, INCORPORATED

ACCEPTED:

AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONBY WITNESS: Albert J. ZuckAddress: Director, Public Relations
AFL-CIOBY WITNESS: Margaret Parry TrameyAddress: Brooke Meadow Farm
Brookville, Md.WITNESS: Bettie J. WoodAddress: 803 Maynard Ave
Silver Spring, Md.WITNESS: Parker J. WenzelAddress: Assistant Dir. Public Relations
AFL-CIO

NORWOOD STUDIOS, INC.

DISTRICT 7-2992

926 NEW JERSEY AVE., N.W.

WASHINGTON 1, D.C.

111

August 29, 1958

Mr. Robert Wentworth
Assistant Director
Department of Public Relations
AFL-CIO

Re: Music - 39 Series AFL-CIO

Dear Mr. Wentworth:

Please consider this an amplification of our letter to you dated August 11, 1958, regarding the costs of original music for the above captioned production.

Music Recording - 1- 3hr. session

Recording Time 3 hrs.	@ \$ 60.00	\$ 180.00
Tape Purchase 1" Rolls 2 Rolls	@ 30.00	60.00
" " 35MM 4 Rolls	@ 50.00	200.00
Editorial Time 8 hrs.	@ 12.00	96.00
Transportation & Rentals		50.00
Copying		337.50
Overhead (32%)		<u>\$ 923.50</u>
		295.36
		<u>\$ 1,218.86</u>
		1,718.86
	20 Shows	<u>\$ 26,377.20</u>
		1,718.86
		<u>\$ 24,658.30</u>

Musicians

10 Musicians	\$ 500.00
1 Conductor	100.00
Overhead (15%)	<u>\$ 600.00</u>
	90.00
	<u>\$ 690.00</u>
20 Shows	\$ 13,800.00

Composer

Composer (15%)	20 Shows	\$ 11,950.00
	Total	<u>\$ 55,327.20</u>
* Less: Cost of Music Royalties included in contract dated July 16, 1958		<u>\$ 53,127.20</u>
		\$ 8,580.00
		<u>\$ 6,517.20</u>
		<u>\$ 44,547.20</u>

Norwood Studios, Inc. retains for itself no rights in
and to the materials produced hereunder. All rights to the
music as recorded being vested in the AFL-CIO.

Please execute and return to us the enclosed copy at
your convenience.

Sincerely,

NORWOOD STUDIOS, INC.

By:

Norman H. Burrows
Vice-President

Accepted:

American Federation of Labor
and Congress of Industrial
Organizations

By:

* See our letter dated May 27, 1958

"Music, mix, tape transfer- \$ 20,800.00"

Music royalties portion of above computed
as follows:

11 selections per show @ \$ 20.00 ea. \$ 220.00/show

Cost for 39 shows \$ 8,580.00

APPENDIX C - p 2

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

EXECUTIVE COUNCIL

GEORGE MEANY WM. F. SCHNITZLER
PRESIDENT SECRETARY-TREASURER

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WM C BIRTHRIGHT
DAVID DUBINSKY
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JOSEPH CURRAN
JOSEPH D. KEENAN
A. PHILIP RANDOLPH
JOSEPH A. BEIRNE
KARL F. FELLER
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EXECUTIVE COMMITTEE

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DAVID DUBINSKY
WM. F. SCHNITZLER



815 SIXTEENTH STREET, N.W.
WASHINGTON 6, D.C. NATIONAL 8-3870

July 6, 1959

Mr. Philip Martin, Jr.
President, Norwood Studios, Inc.
926 New Jersey Avenue, N.W.
Washington 1, D. C.

Dear Mr. Martin:

It is the desire of the AFL-CIO to continue its present contract with you for the production of "Americans At Work", for an additional thirteen weeks past the expiration of the present thirty-nine week contract.

It is our purpose that this extension of the contract be subject to all of the understandings now in effect.

If this is agreeable with Norwood Studios, will you please let me know?

Sincerely yours,

Albert J. Zack

Albert J. Zack
Director
Department of Public Relations

ajz:hij

APPENDIX "D"

A G R E E M E N T

A R T I C L E IScope and Performance

Norwood Studios, Inc., hereinafter referred to as the contractor agrees to make and deliver to the AFL-CIO, a completed series of fifty-two 13½ minute 16 mm. black and white sound motion picture shows entitled "Americans at Work" subject to the following:

1. GENERALA. Scripts

1. The contractor shall, upon instructions from the TV coordinator, appointed by the AFL-CIO, proceed to research and develop a shooting guide for each program.
2. Upon approval of said shooting guide by the TV coordinator, it is to be used by the production crew as a guide for photographic coverage of the specific program. The Director-Cameraman will be granted latitude and expected to exercise creative prerogative to include, add or change scenes as necessary while on location. The story line however, shall not be changed without prior approval of the TV coordinator.
3. Upon approval of the "to length" cut, the contractor will prepare a suitable narration which fits the visual presentation and submit same to the TV coordinator for his approval. Until such approval is obtained no recordings is to be done.
4. The contractor will be responsible for the engaging of script writers approved by the AFL-CIO to perform the above listed services. These writers are to be engaged for the sole purpose of these programs and shall devote their entire time exclusively to them.

B. Scope and Locations

1. The subject matter shall include any subject deemed suitable by the TV coordinator who will provide policy supervision, and contact and liaison with acceptable organizations.
2. Location shooting shall be required anywhere within the continental limits of the U.S.A. subject to the provisions of Article VII. It shall be the responsibility of the TV coordinator to find acceptable locations and to obtain permission from the proper authorities for the filming of motion pictures at these locations by the contractor's personnel.
3. Should the AFL-CIO require photography outside of the continental limits of the U.S.A., such additional costs will be the subject of negotiation. In no case shall such additional charges consist of more than actual verified expenditures plus the contractor's stated overhead.

C. Production Personnel

1. All personnel shall be fully professional and of proven past experience in their respective fields.
2. All personnel shall be members in good standing of the International Alliance of Theatrical Stage Employees (I.A.T.S.E.).

APPENDIX E - p 2

3. The contractor shall obtain permission to use and exhibit on the end titles of each program the seal of the I.A.T.S.E.
4. The contractor shall assign a Producer who will give full time and attention exclusively to these programs and will be responsible for meeting production schedules, quality of the work performed and final delivery of the completed programs.
5. The contractor's Producer will work closely with the TV coordinator but the latter will have the final approval of all work performed by the contractor.

D. Production

1. All work will be of the highest professional quality.
2. All equipment will be standard professional equipment in good repair. Delays including those due to equipment breakdown will not be honored as reimbursable.
3. While the AFL-CIO will make every effort to expedite production, approvals and verify the factual content of the programs, the contractor will be prepared to make at his own expense any changes deemed necessary by the AFL-CIC until the time permission is given to begin release printing.
4. Daily shipment of exposed film will be made from location to the Laboratory for processing and printing. The contractor shall make daily prints available for viewing by the TV coordinator in Washington, D. C. The contractor's Producer, Writer and Film Editor shall be in attendance at such viewings.
5. A minimum of five (5) days photography will be required on each program. However, the TV coordinator will have the final determination as to whether or not the subject has been covered sufficiently and the contractor will supply at his cost any additional material required by the TV coordinator.
6. The use of stock footage, unless specifically approved by the TV coordinator, is forbidden.

E. Screenings

1. The contractor, in addition to daily screenings, will make available screening facilities in Washington, D. C. for the following:
 - (a) "Overlength" cut and rough narration
 - (b) "To length" cut and narration
 - (c) Answer print

The contractor's Producer, Writer and Film Editor will be in attendance at all of these screenings. The time of screenings to be at the convenience of the TV coordinator.

APPENDIX E - p 3**F. Production Procedures**

1. Research on assigned story.
2. Submission of shooting guide.
3. Approval of shooting guide.
4. Begin production.
5. Screening of dailies.
6. Assembly of long-cut.
7. Preparation of long-cut narration.
8. Screening of long-cut and narration.
9. Approval of long-cut and narration.
10. Preparation of to-length cut and narration.
11. Screening of to-length cut and narration.
12. Approval of to-length cut and narration.
13. Record narration, mix, track transfer.
14. Negative matching.
15. Delivery of Answer Print.
16. Approval of Answer Print.

2. SPECIFIC REQUIREMENTS**A. Staffing**

Personnel whose full time and attention to the program is a requirement.

1. Producer.
2. Two writers.
3. Two cameramen.
4. Two assistant cameramen.
5. Two electricians.
6. Three film editors.

B. Transportation and Subsistence

All costs of transportation and subsistence will be borne by the contractor per the requirements of this specification subject to the provisions of Article I B and Article VII.

C. Equipment

The contractor shall supply all motion picture and associated equipment necessary for the production of these programs.

D. Sound

APPENDIX E - p. 4**D. Sound.**

Contractor will furnish sound in accordance with "Voice-over" technique.

E. Raw Stock and Laboratory

1. The programs are to be filmed on 16 mm B & W negative. Reversal film will not be acceptable. The use of high speed, high contrast and grainy raw stock as a substitute for insufficient lighting equipment will not be acceptable.
2. Inferior work or accidents on the part of the contractor's laboratory are the responsibility of the contractor.
3. A minimum of 2400 feet of 16 mm B & W negative must be exposed for each program.
4. A minimum of 1800 feet of 16 mm B & W work print must be available for the editing of each program.

F. Editing

1. The film editing will continue on each program until such time as all necessary approvals have been received.
2. Sound effects will be required as deemed necessary by the TV coordinator.
3. Printor effects will be required as deemed necessary by the TV coordinator.
4. Negative matching will be accomplished by "A" and "B" roll cutting, making possible invisible splices.

G. Titles

1. Superimposed titles over an action background will be required for each program.
2. A standard end title assembly consisting of art background, AFL-CIO seal and appropriate overlay titles is required. The same title assembly to be used on each program.

H. Music

Original recorded music will be required for these programs and will be accomplished as follows:

1. The contractor shall employ a music composer on a full time basis.
2. All arranging and copying charges will be borne by the contractor.
3. A maximum of 27 minutes of music can be recorded in one three-hour session.

APPENDIX E - p 5

4. The original compositions will total not less than 400 minutes.
5. The sum total of man hours for musicians shall not be less than 900 distributed over 30 recording sessions.
6. All costs for recording, including musicians, will be borne by the contractor.
7. All musicians shall be members in good standing of A.F.M. and all recording accomplished in the continental U.S.A. within the jurisdiction of an appropriate local of the A.F.M. Recording will be accomplished by members in good standing of the I.A.T.S.E.

I. Delivery Requirements per program

1. 16 mm B & W work picture properly marked and cued.
2. Minus dialogue magnetic sound track consisting of music and effects on 35 mm magnetic film.
3. $\frac{1}{2}$ " Protection magnetic tape of narration, music and effects mix.
4. 16 mm photo-optical sound track.
5. One (1) 16 mm B & W Composite Answer Print made by "A" and "B" method, with reel, can and case.
6. One (1) 16 mm B & W single stand fine grain master of matched picture negative including all printer effects and titles, to be accomplished by "A" and "B" roll printing.
7. One (1) 16 mm B & W single stranded Duplicate negative made from the above Fine Grain Master.
8. One (1) 16 mm B & W Composite Answer Print including reel, can and case, made from the above Duplicate negative and sound track.
9. All trims and outs, negative and positive, to be held intact under program identification on the producer's premises at no expense to AFL-CIO until disposition instructions are received by the contractor from the TV coordinator. None of the material, film, etc., may be used for any purpose unless prior permission is received from the TV coordinator.
10. The storage of all film and materials connected with the programs will be on the contractor's premises and fully covered by insurance at the contractor's expense. All editorial services shall be accomplished on the contractor's premises.

APPENDIX E - p 6

3. PRINT AND DISTRIBUTION SPECIFICATIONSA. Print Requirements

1. Three (3) good quality projection B & W Composite Release prints made by "A" and "B" printing with reels, cans and cases.
2. Fifty (50) TV quality B & W Composite Release prints made from the Duplicate negative and optical sound track. All with reels, cans and cases.

B. Distribution Requirements

1. Contractor to supply shipping and inspection services for period of 52 weeks beginning with the first program to be released of all prints necessary to service a minimum of one hundred and fifty (150) TV stations.
2. Contractor will maintain inspection and vault location cards on each print, daily shipping sheets and a daily inventory of the number of prints and their condition as well as a post card reminder form for the recovery of "late return" prints.
3. All storage and inspection of prints to be on the contractor's own premises.
4. The AFL-CIO will supply addressed shipping labels and copies of the as-read narration for shipping purposes. Monies expended for postal and express charges shall be reimbursed to the contractor at his cost upon presentation of properly certified invoices.

4. MISCELLANEOUS

- A. Other than the services of the TV coordinator, postal and express charges, all costs involved in the production and distribution of those shows will be born by the contractor.
- B. The services of a narrator, approved by the AFL-CIO shall be paid for at the appropriate screen actor's guild scale by the contractor.

APPENDIX E - p 7

ARTICLE IICredits

It is agreed that production credits shall be allowed in accordance with the policy standards of the industry and will be incorporated in the main title structure. The technical credit card shall also include the seal of the International Alliance of Theatrical and Stage Employees.

ARTICLE IIIWarranty

Contractor warrants that it is the sole owner of all rights, title and interest of every kind, nature and description in and to the Films produced herunder exclusive of the music therein, and that it is the licensee of the rights to the music contained therein to sufficiently support the rights granted in Article IV.

ARTICLE IVRights

Contractor does hereby sell, assign, grant and transfer to the AFL-CIO the full, free and unencumbered right, title and interest in and to the material produced by it under this contract, excepting that the rights in and to the music on the sound track of the shows produced hereunder, shall be limited to those rights which have been transferred to contractor in accordance with the applicable rules and regulations of the American Federation of Musicians.

ARTICLE VIndemnity

Contractor further agrees to indemnify, save and hold harmless, the AFL-CIO, its officers, agents, servants and employees, from and against all claims, demands, suits, and liability of any nature or kind arising out of the alleged unauthorized use of any copyrighted or uncopyrighted materials not furnished by the AFL-CIO.

ARTICLE VIOwnership

It is understood and agreed that upon delivery and acceptance of each answer print, the entire ownership and all rights, thereto possessed by contractor, shall be vested in the AFL-CIO. Contractor shall not reproduce or use any of such materials, nor authorize any other person or organization to do so unless so authorized by the AFL-CIO.

ARTICLE VIITravel, Transportation, and Subsistence Expense

Contractor has allocated \$33,696.00 for travel, transportation and subsistence expense, and he hereby agrees to refund to the AFL-CIO upon completion of the fifty-two shows any portion of said amount not expended for this purpose.

APPENDIX E - p 8

ARTICLE VIIICancellation

Either party may cancel this contract upon completion of any thirteen show segment by notice in writing to the other party of intent to cancel, said notice being delivered not less than thirty days prior to the completion of the thirteen show segment provided, that if upon date of receipt of notice of cancellation by either party motion pictures are in process which shall be deemed to mean all those motion pictures having a shooting guide approved by the TV coordinator, then the AFL-CIO shall have the following options: to complete said motion pictures in process in accordance with the terms of this agreement or to terminate and pay for the motion pictures in process in accordance with the normal cost accounting procedures used by the contractor. If cancellation is by the AFL-CIO then the AFL-CIO will make the following financial adjustments: The payments to the contractor of the difference between weekly and annual wage scales for production personnel engaged in the performance of the contract from the effective date of this contract until the effective date of cancellation provided that because of such cancellation, the contractor shall be required to pay and shall have paid such difference. To determine the weekly and annual wage scales referred to in the foregoing reference will be made to the contracts in force as of the effective date of cancellation between the contractor and The Motion Picture Photographers Union Local 644 (New York City), and The International Alliance of Theatrical and Stage Employees. The additional payment to the contractor of the amount required to be paid and paid by the contractor as a result of such cancellation for overtime work by certain contracts in force between the contractor and the I.A.T.S.E. from the effective date of this contract until the effective date of cancellation. The additional payment to the contractor of any increase in Union Welfare and Pension Fund contribution required to be paid and paid by the contractor as a result of said cancellation.

ARTICLE IXPayment

As consideration for contractor's performance of the services specified in Article I, the delivery and acceptance of the motion pictures and other materials specified therein by AFL-CIO, and the granting of the rights by contractor as recited in Article IV, AFL-CIO will pay contractor the lump sum of \$383,552.00. Upon acceptance by the authorized representative of the AFL-CIO of the answer print, payments will be made in accordance with the following:

The sum of \$7,376.00 plus any authorized overages applicable to the show.

It is understood that any changes in content of the scripts or production schedules necessitating additional charges to the AFL-CIO must first be approved by the AFL-CIO before contractor may proceed.

APPENDIX E - p 9

ACCEPTED: This 24th day of
November, 1959

DATE Oct. 30, 1959

AMERICAN FEDERATION OF LABOR
and
CONGRESS OF INDUSTRIAL
ORGANIZATIONS

By Dee P. Schmitz Jr.

NORWOOD STUDIOS, INC.

By Rudy Miller 10/30/59

(SEAL)

(SEAL)

ATTEST:

Harold Britton

ATTEST:

James H. Brown

FILED
AUGUST 1, 1963
DOCKET NO. 1860

DECISION

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearings on said petition, it is, by the Court this 1st day of August, 1963,

ADJUDGED AND DETERMINED, That a deficiency in sales tax for the period from June 1, 1958 to May 31, 1959, inclusive, in the amount of \$3, 786.60, was erroneously assessed against, and collected from the petitioner; and is hereby cancelled, and it is

FURTHER ADJUDGED AND DETERMINED, That a deficiency in sales tax for the period from June 1, 1959 to May 31, 1960, inclusive, in the amount of \$6, 797.66, was erroneously assessed against, and collected from the petitioner; and is hereby cancelled, and it is

FURTHER ADJUDGED AND DETERMINED, That a deficiency in sales tax for the period from June 1, 1960 to January 31, 1961, inclusive, in the amount of \$4, 130.56, was erroneously assessed against, and collected from the petitioner; and is hereby cancelled, and it is

FURTHER ADJUDGED AND DETERMINED, That the petitioner is entitled to a refund of the aforesaid taxes, with interest thereon at the rate of 4 per centum per annum from December 13, 1962, to the date of the payment of the refund.

s/ Jo V. Morgan

Judge

FILED
SEPTEMBER 3, 1963
DOCKET NO. 1860

MOTION TO REVISE FINDINGS OF FACT,
TO VACATE DECISION IN FAVOR OF PETITIONER,
AND FOR ENTRY OF DECISION IN FAVOR OF
RESPONDENT

Respondent, District of Columbia, pursuant to Rule 12 of the Rules of Procedure Before the District of Columbia Tax Court, moves the Court to revise the Findings of Fact heretofore entered in this case on August 1, 1963, so as to read as hereinafter set forth and, based upon such revision, to vacate the decision of this Court of August 1, 1963 in favor of petitioner, and to enter a decision in favor of respondent.

The grounds for this motion are as follows:

1. The entry by this Court on August 1, 1963 of a decision in favor of petitioner does not accord with the law and evidence applicable in this proceeding and the decision of August 1, 1963 should be vacated.
2. The Findings of Fact, revised in accordance with the revisions set forth in this motion, and the law applicable to this proceeding, require the entry of a decision in favor of respondent.

The Findings of Fact which respondent moves the Court to revise, and the revisions thereof, are as follows:

FINDING OF FACT NO. 2

Revise Finding of Fact 2 (b) by adding a sentence at the beginning to read as follows:

"The production of films by petitioner for the American Federation of Labor and Congress of Industrial Organizations, (AFL-CIO), under contracts hereinafter described, required for each film the utilization of twenty-five to thirty company employees and, during various stages of production, fifty or more employees of subcontractors of petitioner." (Tr. 78-79)

Revise Finding of Fact 2 (c) by adding two sentences at the end to read as follows:

"Numerous people with varying skills and aptitudes are required. There are forty-four different unions whose members are involved in work done by petitioner." (Tr. 80-81)

Revise so much of Finding of Fact 2 (d) as reads:

"In the aforesaid production there are used inconsequential elements or articles of tangible personal property of little actual value, namely. . ."

so as to read:

"In the aforesaid production the tangible personal property used included. . ."

FINDING OF FACT NO. 3

Revise Finding of Fact 3 (c) by adding two sentences at the end to read as follows:

"No sales taxes were assessed against petitioner pursuant to Section 47-2602 and Section 47-2616, D.C. Code, 1961, for the consideration received by petitioner under the agreement designated "N-211 Music.". The consideration totaled \$59,395.96. (See Brief on Behalf of Petitioner, pp. 7-8.)

FINDING OF FACT NO. 7

Revise Finding of Fact 7 (a) so as to read:

"Petitioner had no laboratory facilities for developing and processing film. Capital Film Laboratories, Inc., as a subcontractor of Petitioner, did this work. Capital Film received exposed but undeveloped film from petitioner. This film was developed, becoming a negative. It was then printed on positive film which was used as a "work print" for the purposes of editing and cutting. The length of the work print was 6 to 15 times the length of the release print. Capital Film also turned out an "answer print" or "first trial print". This was:

' . . . a positive print, which after the negative has been matched and the sound track has been put to it, you then use this print to judge as to whether the optical effects are in the right place. That is the fades and dissolves and whether the sound is synchronized properly and whether the negative has been cut properly, the timing and whether the density of the scenes is correct. It is almost equivalent to what you would call a printer's proof. . .'*

This print was received by the petitioner, the AFL-CIO, and the appropriate reviewing personnel of Capital Films. Corrections were then made and, when finally accepted by the AFL-CIO, the release prints were produced." (*Tr. 35; Tr. 34-35, 37-38, 61-62)

"Petitioner paid said Capital Film Laboratories \$62, 165.50 for developing and processing and for film supplied in connection with contract N-211 and \$54, 009.46 for developing and processing and for film supplied in connection with contract N-320. These totals do not include charges made for sales taxes previously paid and cab fare required therein." (Stipulation with attached Joint Exhibit 1-A and 2-B filed July 22, 1963)

FINDING OF FACT NO. 8

Strike Finding of Fact 8 (a)

Revise Finding of Fact 8 (d) so as to read:

"The total sales price of the films produced by petitioner herein for the AFL-CIO under the contracts heretofore mentioned was \$735, 741.19."

Renumber Finding of Fact 8 (b), 8 (c) and 8 (d) to read 8 (a),
8 (b) and 8 (c), respectively.

/s/ Chester H. Gray
CHESTER H. GRAY
Corporation Counsel, D.C.

/s/ Henry E. Wixon
HENRY E. WIXON
Assistant Corporation Counsel, D.C.

/s/ Donald T. Fish
DONALD T. FISH
Assistant Corporation Counsel, D.C.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion To Re-vise Findings of Fact, to Vacate Decision in Favor of Petitioner, and For Entry of Decision in Favor of Respondent was mailed, postage prepaid to Werner Strupp, Esquire, attorney for petitioner, 1735 DeSales Street, N.W., Washington 6, D.C. this 3rd day of September, 1963.

/s/ Donald T. Fish
DONALD T. FISH
Assistant Corporation Counsel, D.C.

FILED

September 9, 1963

DOCKET NO. 1860

**OPPOSITION TO MOTION TO REVISE
FINDINGS OF FACT, TO VACATE DECISION
IN FAVOR OF PETITIONER, AND FOR ENTRY
OF DECISION IN FAVOR OF RESPONDENT**

The petitioner in the above-entitled action opposes the motion filed by the respondent on September 3, 1963. Such opposition is based upon the following grounds:

1. The decision entered by the Court on August 1, 1963 is in full accord with all the evidence adduced in this proceeding and with the law applicable thereto. No grounds are stated in the respondent's motion for its contrary contention. The respondent's position was set forth in its brief and nothing has been added to the arguments heretofore considered by the Court. Therefore, the motion to vacate the decision of August 1, 1963 should be denied.

2. The motion to revise the Findings of Fact should be denied for the following reasons:

a. The motion is not timely filed. The motion filed by the respondent and granted by the Court on August 16, 1963, was for extension of time to file motions under Rules 12(e) and 12(f) of the Rules of this Court. Such rules relate to rehearing, further hearing, reconsideration and vacation or revision of the decisions and not to amendment or

revision of the findings of fact. Obviously, the decision and findings are entirely different as is demonstrated by reference to Section 47-2403, D. C. Code (1961) which speaks of the Court's decision "thereon" after findings of fact and conclusions of law have been made. Accordingly, the extension of time granted to the respondent did not include the right to seek an amendment of findings of fact. Rule 52(b) of the Federal Rules of Civil Procedure, applicable by virtue of Rule 21(a) of the Rules of this Court, provides that findings of fact may be amended by the Court upon motion made not later than 10 days after entry of judgment. It has already been shown that no such motion was filed.

b. If, in the alternative, the motion to revise the findings was timely filed, it should be denied for the reasons set forth below.

FINDING OF FACT NO. 2

The additions to Findings of Fact 2(b) and 2 (c) would add facts wholly unnecessary to the determination of this case. The number of persons needed for the production of films and who they were working for are facts that do not affect the essential nature of the work done.

The proposed revision of Finding of Fact 2(d) would delete the ultimate factual conclusion reached by the Court upon consideration of the evidence. In effect, it would substitute the District's conclusion for that reached by the Court. Such revision should, therefore, be rejected.

FINDING OF FACT NO. 3

The proposed addition to Finding of Fact 3(c) would add a fact that at most relates to the computation of the refund, i.e., that on part of the consideration received by the petitioner, no tax was collected. For purposes of the findings of fact, we submit that this information is of no importance.

FINDING OF FACT NO. 7

The lengthy revision of Finding of Fact 7(a) is superfluous and unnecessary in view of the completeness of the Court's finding and the full description of the elements entering into the production of the motion pictures contained in the Court's Finding of Fact 2(d). The reference to the dollar amount paid by the petitioner to Capital Film Laboratories adds nothing of significance as it is not descriptive of the value of tangible personal property used in the production process. The value of such tangible property is covered by the evidence and by the Court's Finding of Fact 8(b).

FINDING OF FACT NO. 8

To strike Finding of Fact 8(a) would delete the Court's ultimate finding of fact based upon all of the evidence. Not only would such deletion render the Court's opinion and decision meaningless, but it would in effect substitute the respondent's interpretation of the facts for that of the Court. We submit that the Court's finding is fully supported by the evidence and the revision should, therefore, be rejected.

The revision of Finding of Fact 8(d), proposed in the motion, not only would delete a finding consistent with the Court's interpretation of the facts, as contained in Finding of Fact 8(a), but it would substitute a fact already detailed in Finding of Fact No. 5 which contains a complete analysis of the various contracts involved and of the consideration received therefor.

For the reasons herein set forth, the respondent's motion to enter a decision in its favor should be denied. In all other respects, the respondent's motion should likewise be denied.

s/ Nathan Sinrod
Nathan Sinrod

s/ Werner Strupp
Werner Strupp
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the attached Opposition to Motion to Revise Findings of Fact, to Vacate Decision, and for Entry of Decision in Favor of Respondent, was mailed, postage prepaid, to Henry E. Wixon, Esquire, Assistant Corporation Counsel, D.C., attorney for respondent, this 9th day of September, 1963.

s/ Werner Strupp
Werner Strupp

FILED
SEPTEMBER 11, 1963
DOCKET NO. 1860

M E M O R A N D U M

The respondent has filed a Motion to Revise Findings of Fact, to Vacate Decision in Favor of Petitioner, and for Entry of Decision in Favor of Respondent. The Petitioner has filed opposition.

The respondent asked the Court to amend Findings of Fact herein numbered 2(b), 2(c), 3(c), 7(a), and 8(d); and to strike out Findings of Fact No. 8(a).

The petitioner's first objection is that the motion of the respondent was not timely filed. The Court believes that such opposition is not valid, and holds that the motion was filed in time. As to the merits of the motion The Court herewith will amend the Findings of Fact to the following extent, namely, by inserting between the heading "Findings of Fact" and Findings of Fact No. 1, on the first page of the Findings of Fact and Opinion the following:

"Some of the facts have been stipulated by the parties and as stipulated are found by the Court. The Court makes additional Findings of Fact as follows."

Findings of Fact No. 3(c) will be amended by adding two sentences at the end to read as follows:

"No sales taxes were assessed against petitioner pursuant to Section 47-2606 and Section 47-2616 D. C. Code, 1961, for the consideration received by petitioner under the agreement designated "N211 Music". The consideration totaled \$59, 395. 96."

In all other respects the motion of the respondent will be denied.

An Order will be entered in accordance with this Memorandum.

s/ Jo V. Morgan

Judge

FILED
SEPTEMBER 11, 1963
DOCKET NO. 1860

ORDER AMENDING FINDINGS OF FACT

Upon consideration of the Motion of the respondent to revise Findings of Fact, to Vacate Decision in Favor of Petitioner, and for entry of Decision in Favor of Respondent and the opposition of the petitioner thereto, it is by the Court this 11th day of September, 1963

ORDERED, That the Findings of Fact made in the above-entitled case are hereby amended by inserting between the heading "Findings of Facts" and Findings of Fact No. 1, on the first page thereof, the paragraph following:

"Some of the facts have been stipulated by the parties, and as stipulated are found by the Court. The Court makes additional Findings of Facts as follows:

AND IT IS FURTHER ORDERED, That Findings of Fact No. 3(c) is hereby amended by adding thereto two sentences at the end to read as follows:

"No sales taxes were assessed against petitioner pursuant to Section 47-2606 and Section 47-2116, D.C. Code, 1961, for the consideration received by petitioner under the agreement designated "N-211 Music". The consideration totaled \$59, 395. 96."

In all other respects the aforesaid motion be and the same is hereby denied.

s/ Jo V. Morgan
Judge

Memorandum and Order
served as follows:

Werner Strupp, Esq.,
Attorney for Petitioner,
1735 DeSales Street, N.W.,
Washington 6, D.C. (Mailed 9/11/63)

Corporation Counsel, D.C. (Mailed 9/11/63)

Phyllis R. Liberti,
Clerk

FILED

OCTOBER 10, 1963

DOCKET NO. 1860

PETITION FOR REVIEW OF A DECISION OF THE
DISTRICT OF COLUMBIA TAX COURT

Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia:

1. The District of Columbia petitions for a review by the United States Court of Appeals for the District of Columbia Circuit, of a decision of the District of Columbia Tax Court made in the above-entitled case.

2. The decision of which review is sought cancelled assessments of District of Columbia sales taxes against the petitioner for the periods and in the amounts as follows:

June 1, 1958, to May 31, 1959, in the amount of \$3,786.60; June 1, 1959, to May 31, 1960, in the amount of \$6,797.66; and June 1, 1960, to January 31, 1961, in the amount of \$4,130.56. The decision held that petitioner is entitled to a refund of the aforesaid taxes, with interest thereon at the rate of four per centum per annum from December 13, 1962, to the date of the payment of the refund.

3. The decision of the Tax Court was entered on August 1, 1963. On August 16, 1963, respondent filed a motion for extension of time within which to file motions under Rule 12(e) and Rule 12(f) of the Rules of the District of Columbia Tax Court. That motion was granted by the Court on

August 16, 1963. On September 3, 1963, respondent filed a motion to revise the Court's findings of fact, to vacate the decision of the Court in favor of petitioner, and for entry of a decision in favor of respondent. The Tax Court, by a memorandum and order dated September 11, 1963, amended certain of its findings of fact, but, with those exceptions, denied respondent's motion.

CHESTER H. GRAY
Corporation Counsel, D. C.

HENRY E. WIXON
Assistant Corporation Counsel, D.C.

DONALD T. FISH
Assistant Corporation Counsel, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for review of a decision of the District of Columbia Tax Court was mailed, postage prepaid, to Werner Strupp, Esq., attorney for petitioner, 1735 DeSales Street, N. W., Washington 6, D. C., this _____ day of October, 1963.

DONALD T. FISH
Assistant Corporation Counsel, D.C.

FILED

DECEMBER 9, 1963

DOCKET NO. 1860

DOCKET

DATE	PROCEEDINGS	MEMORANDUM
<u>1963</u>		:
Jan. 31	Petition filed - Taxpayer notified - Corporation Counsel and Finance Office served.	: Sales Tax :\$14,714.82
Apr. 2	Hearing set April 16 - Certificate of Service.	:
Apr. 16	Hearing - Henry E. Wixon, Esq. and Donald T. Fish, Esq., for District.	:
Apr. 18	Second Hearing - Henry E. Wixon, Esq. for District.	:
May 8	Motion For Extension Of Time To File Brief on Behalf Of Petitioner - Granted - Certificate of Service.	:
May 20	Brief On Behalf Of Petitioner - Certificate of Service.	:
July 22	Stipulation.	:
July 26	Brief For Respondent Nature of Controversy - Certificate of Service.	:
Aug. 1	Findings Of Fact And Opinion - Decision - Certificate of Service.	:
Aug. 16	Motion For Extension Of Time Within Which To File Motions Pursuant To Rule 12(e) And Rule 12(f) - Granted - Certificate of Service.	:

DATE **PROCEEDINGS**

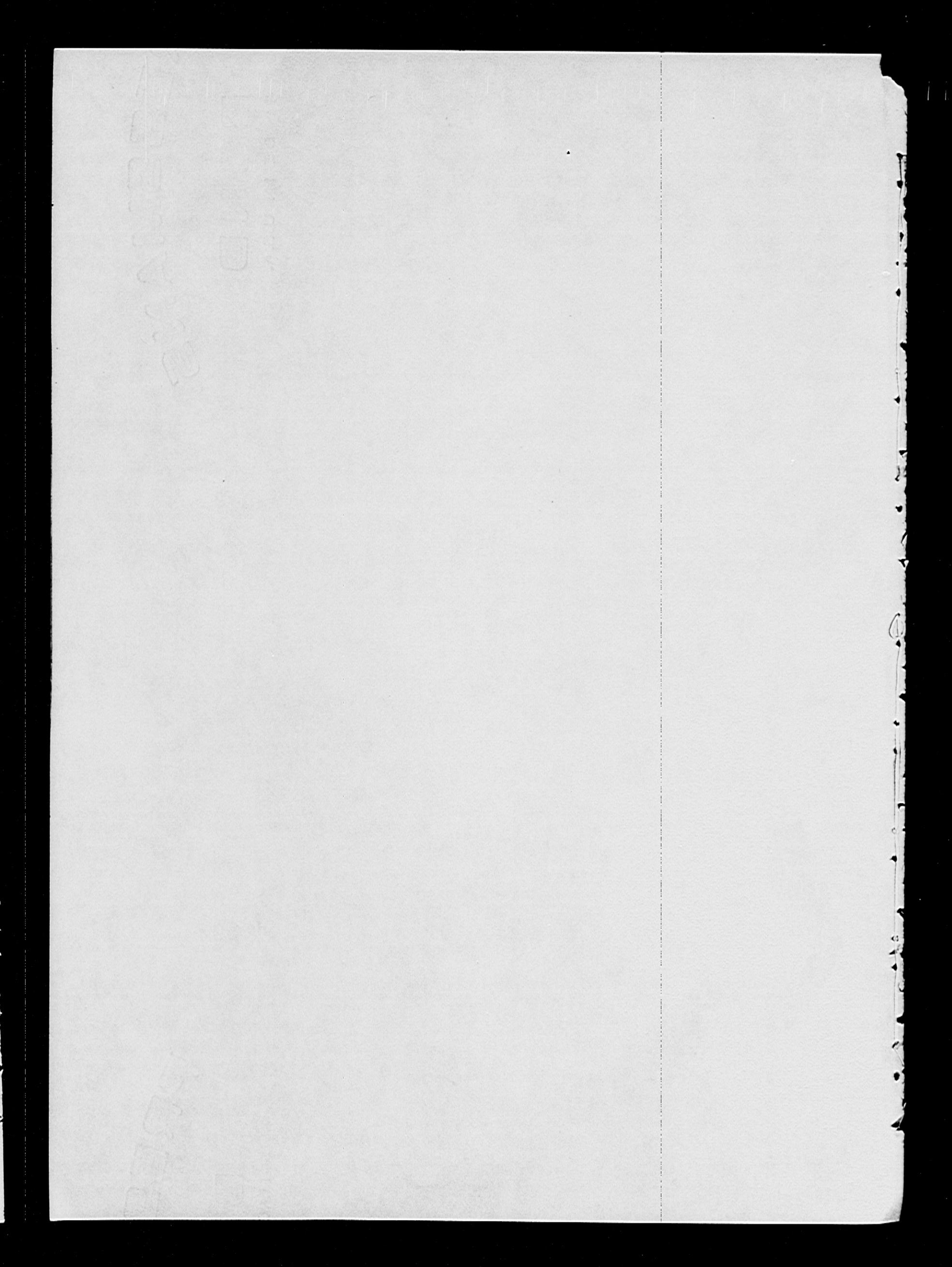
Sept. 3 Motion To Revise Findings Of Fact, To Vacate Decision In Favor Of Petitioner, And For Entry Of Decision In Favor Of Respondent - Certificate of Service.

Sept. 10 Opposition To Motion To Revise Findings Of Fact, To Vacate Decision In Favor Of Petitioner, And For Entry Of Decision In Favor Of Respondent - Certificate of Service.

Sept. 11 Memorandum - Order - Certificate of Service.

Oct. 10 Petition For Review Of A Decision Of The District Of Columbia Tax Court filed by Respondent - Certificate of Service.

Oct. 30 Designation Of Record - Certificate of Service.



BRIEF FOR RESPONDENT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,237

DISTRICT OF COLUMBIA, *Petitioner*

v.

NORWOOD STUDIOS, Inc., *Respondent*

On Petition for Review of a Decision of the District of Columbia Tax Court

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 28 1964

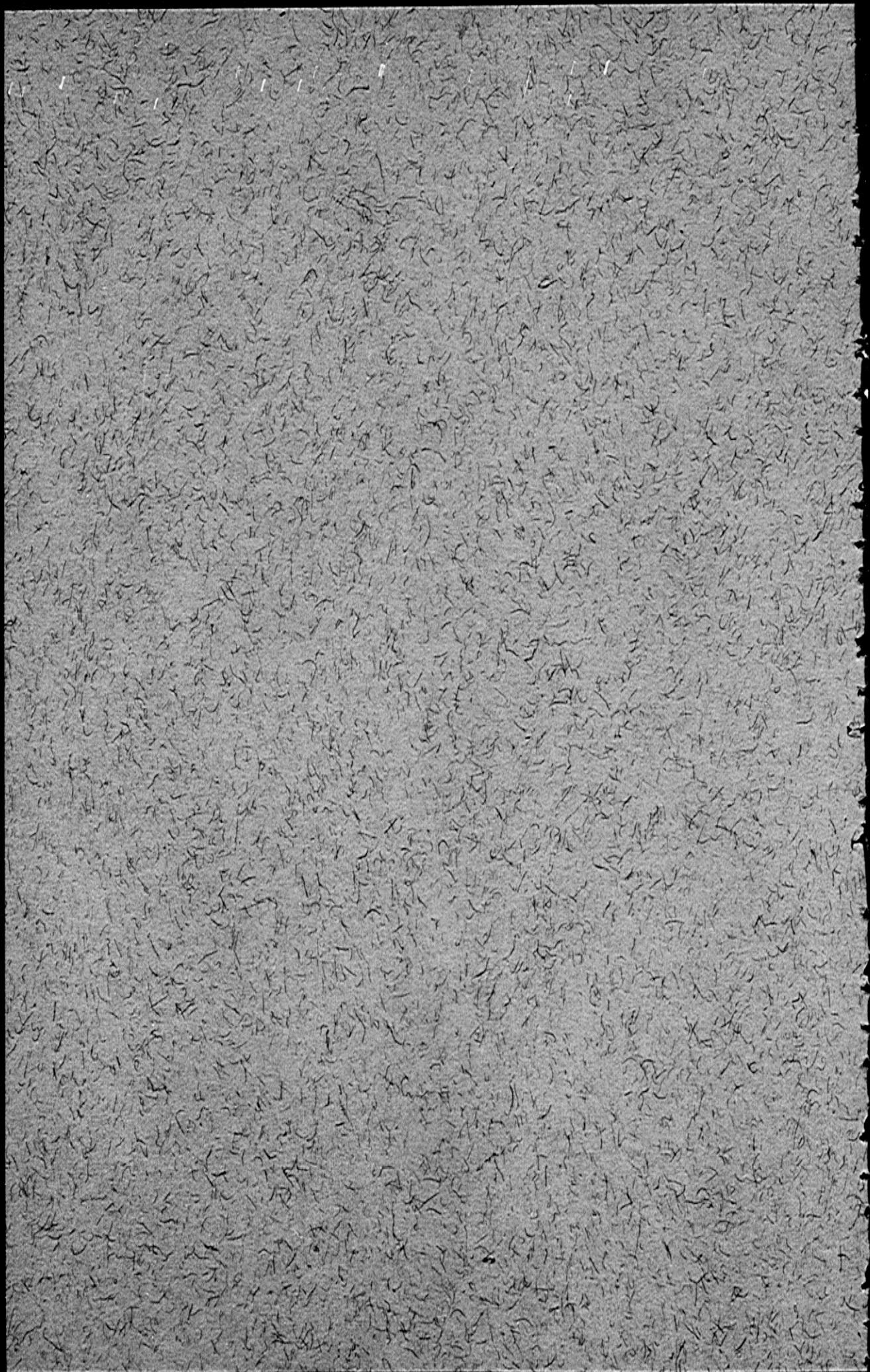
Nathan J. Paulson
CLERK

NATHAN SINROD

WERNER STRUPP

Attorneys for Respondent

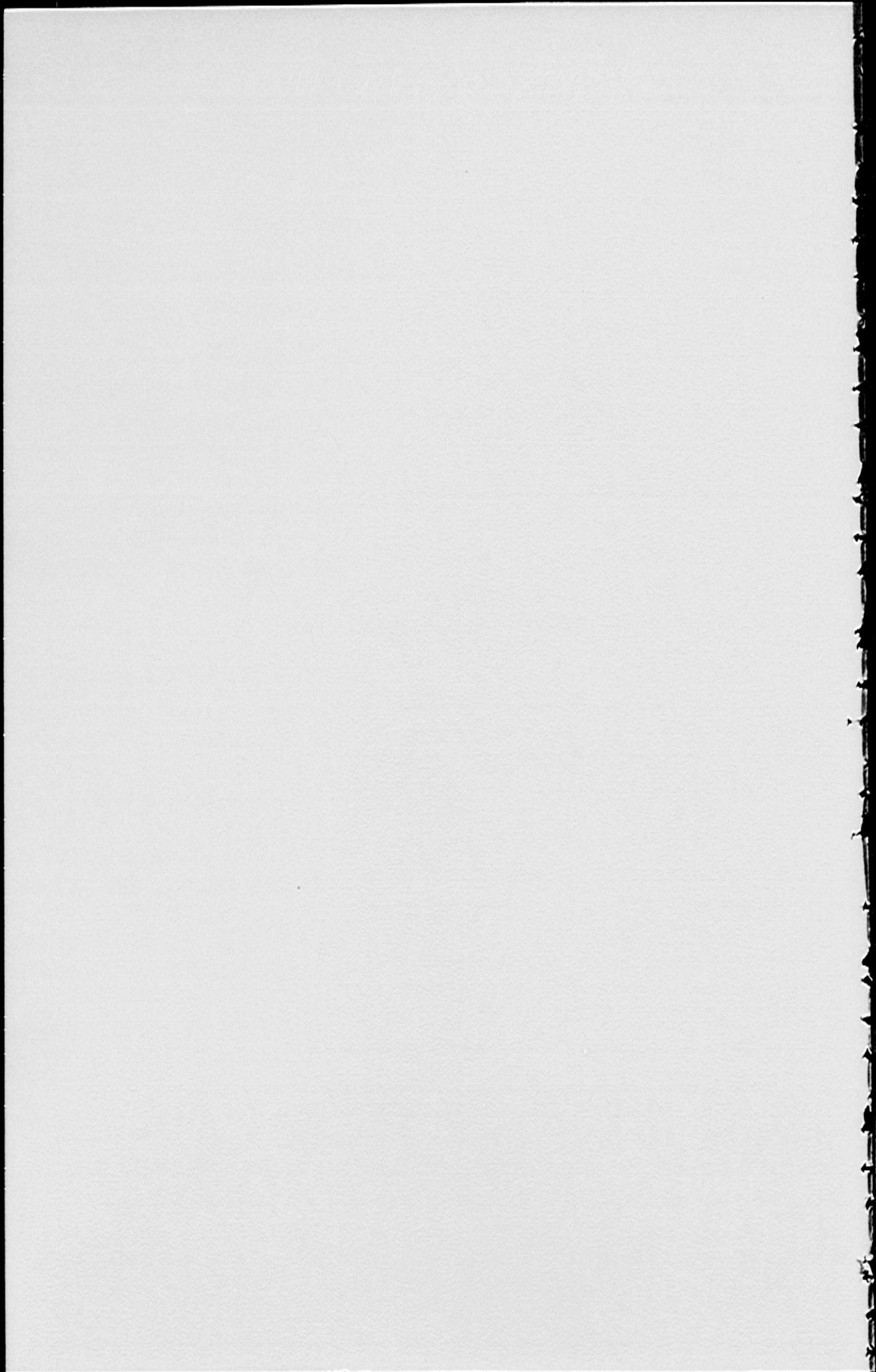
1735 DeSales Street, N. W.
Washington 36, D. C.



QUESTIONS PRESENTED

In the opinion of respondent, the questions presented on this appeal are as follows:

1. Whether, based upon all the evidence before the District of Columbia Tax Court, that Court was correct in concluding that the production of motion pictures is a "personal service" transaction which involves "sales as inconsequential elements" as those terms are used in the applicable statute and defined in the regulations.
2. Whether, in the alternative, the decision of the Tax Court should be sustained on the ground that contracts performed by the respondent were in interstate commerce and, therefore, exempt from the imposition of the sales tax by virtue of restrictions imposed by the Constitution, the sales tax statute and applicable regulations.



SUBJECT INDEX

	Page
QUESTIONS PRESENTED	Frontispiece
COUNTERSTATEMENT OF THE CASE	2
STATUTES AND REGULATIONS INVOLVED	3
SUMMARY OF ARGUMENT	5
ARGUMENT	5
CONCLUSION	14

CASES CITED

<i>Adair Printing Co. v. Ames</i> , 364 Ill. 342, 44 N.E. 2d 481	7
<i>J. D. Adams Manufacturing Co. v. Storen</i> , 304 U.S. 307, 82 L. Ed. 1365, 58 S. Ct. 913	14
<i>American Bridge Co. v. Smith</i> , 352 Mo. 616, 179 S.W. 2d 12, Cert. den. 323 U.S. 712, 65 S. Ct. 37, 89 L. Ed. 573	9
<i>J. A. Burgess & Co. v. Ames</i> , 359 Ill. 427, 194 N.E. 565	7
<i>Burke v. Merrill Lynch, Fenner & Smith, Inc.</i> , 363 S. W. 2d 392 (Tex. 1962)	9
* <i>Commissioner v. Duberstein</i> , 363 U.S. 276, 80 S. Ct. 1190, 4 L. Ed. 2d 1218	11
<i>District of Columbia v. Ghent</i> , 95 U.S. App. D.C. 103, 220 F. 2d 210	8
<i>District of Columbia v. Jones</i> , 106 U.S. App. D.C. 191, 271 F. 2d 457	8
* <i>District of Columbia v. Washington Post</i> , 98 U.S. App. D.C. 304, 235 F. 2d 531	7
<i>Freeman v. Hewit</i> , 329 U.S. 249, 67 S. Ct. 274, 91 L. Ed. 265	12
<i>General Motors Corporation v. District of Columbia</i> , D.C. Tax Ct. Docket Nos. 1698 and 1699, decided January 29, 1962	12
<i>Helvering v. National Grocery Co.</i> , 304 U.S. 282, 58 S. Ct. 932, 82 L. Ed. 1346	11

* Cases chiefly relied on are marked by asterisks.

	Page
<i>Southern Pacific Co. v. Gallagher</i> , 306 U.S. 167, 59 S. Ct. 389, 83 L. Ed. 586	13
<i>United Aircraft Corp. v. O'Connor</i> , 141 Conn. 530, 107 Atl. 2d 398	7
<i>VanZandt v. Fort Worth Press</i> , 359 S. W. 2d 893 (Tex. 1962)	9
<i>Wallender-Dedman Co. v. Department of Revenue</i> , 15 Ill. 2d 485, 155 N. E. 2d 574	7
* <i>Washington Times-Herald, Inc. v. District of Columbia</i> , 94 U.S. App. D.C. 154, 213 F. 2d 23	7, 8
<i>Young v. Commissioner of Internal Revenue</i> (9th Cir.) 268 F. 2d 89	11

STATUTES, REGULATIONS AND RULES CITED

U. S. Constitution, Art I, Sec. 8	
District of Columbia Code (1961)	
Section 28-1203, Rule 5	3, 13
Section 47-1574	8
Section 47-2404	3, 4, 11
Section 47-2601-14(b)(3)	5, 9
Section 47-2605(m)	3, 12
Internal Revenue Code (Title 26, U.S.C.)	
Section 7482(a)	11
D. C. Sales and Use Tax Regulations	
Section 202(b)	6
Section 401(l)	4, 12
Federal Rules of Civil Procedure	
Rule 52(a)	11

* Cases chiefly relied on are marked by asterisks.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,237

DISTRICT OF COLUMBIA, *Petitioner*

v.

NORWOOD STUDIOS, INC., *Respondent*

On Petition for Review of a Decision of the District of
Columbia Tax Court

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

In addition to the transactions set forth on pages 2 and 3 of petitioner's brief as having occurred between the AFL-CIO and the respondent, the Tax Court also found that as part of job number N-211, Norwood Studios, Inc. had furnished music for the films. In consideration therefor, the respondent received the sum of \$59,395.96, thus making

the grand total from all transactions with the AFL-CIO the sum of \$795,137.15 (J. A. 85-86).

In the course of producing a motion picture, a "work print" and an "answer print" are produced. These are preliminary to the final result which is the release print (J. A. 20). Neither the work print nor the answer print have any permanent value after the picture is completed (J. A. 8, 16, 22).

The facilities of Capital Film Laboratories were used by the respondent in order to meet certain of the requirements of the contracts with the union, principally in developing and processing the negative in order to produce the final release print (J. A. 26).

The respondent's president testified before the Tax Court that in the production of the films involved, the services of twenty-five to thirty of its own employees and approximately another fifty persons employed by the subcontractor were utilized (J. A. 35-36).

Testimony showed that the positive film purchased by the laboratory has a cost value of one cent per foot (J. A. 62). In the opinion of the expert witness, the cost of raw film was identical with its actual value (J. A. 64). This testimony was corroborated by the president of the film laboratory who also stated that what increased his price of film charged to the producer over the cost value were the labor performed, depreciation of machinery and overhead expenses (J. A. 69).

In respect of the principal contracts involved, the agreement required the respondent to ship the completed films to various television stations all over the United States (J. A. 17). This was done primarily by means of parcel post (J. A. 17). The respondent was reimbursed for the cost of shipping the films (J. A. 29). The films were sent in accordance with instructions previously furnished by the AFL-CIO (J. A. 31). The shipments were made to

points outside the District of Columbia (J. A. 46, 52). Upon being returned to the respondent after having been shown by a particular television station, the films were inspected and shipped again to another station (J. A. 53, 54).

STATUTES AND REGULATIONS INVOLVED

Rule 5, Section 28-1203, D. C. Code (1961)

If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Section 47-2605, D. C. Code (1961) Exemptions

(m) Sales which a State would be without power to tax under the limitations of the Constitution of the United States.

* * *

Section 47-2404, D. C. Code (1961) Review by Court

(a) The decision of the Board may be reviewed by the court as hereinafter provided if a petition for such review is filed by either the District or the taxpayer within thirty days after the decision is rendered. Such petition for review shall be filed with the Board, and shall be in such form as the Board by regulation shall provide. Upon such review the court shall have the power to affirm, modify, or reverse the decision of the Board with or without remanding the case for hearing as justice may require. The court shall have the exclusive jurisdiction to review the decisions of the Board in the same manner and to the same extent as decisions of the United States District Court for the District of Columbia in civil actions tried without a jury; and the judgment of the court shall be final, except that it shall be subject to review by the Supreme Court

of the United States upon certiorari in the manner provided in title 28, United States Code, section 1254, as amended. The court is authorized to adopt rules for the filing of the record on review, the preparation of the record for review, and the conduct of the proceedings upon such review.

* * *

Section 401—Sales Tax Regulations

(1) *Interstate Commerce.*—The tax is applicable to the receipts from all sales even though the property sold and delivered in the District is for exclusive use in interstate commerce.

However, the Act specifically provides for the exemption of the receipts from sales which a State would be without power to tax under the Federal Constitution. Generally speaking, a State is without power to burden interstate commerce; the power to regulate commerce between the States having been specifically reserved to the Federal Congress in the Federal Constitution.

The receipts from the sale of tangible personal property for use in conducting a business which constitutes interstate commerce is not exempt from the tax solely by reason of that fact. Neither would the receipts from the sale of tangible personal property in the District be exempt by reason of the fact that the vendor delivered the property from without the District if the facts and circumstances indicate that the contract of sale would not require, contemplate or necessarily involve the shipment of goods from outside the District.

Where a registered vendor in the District undertakes to, and does in fact, as part of the retail sale consideration for which is included in the sales price, deliver the property sold to the purchaser outside the District, the gross receipts therefrom are exempt from the tax unless the property sold is for use, storage or consumption in the District.

Where a registered vendor in the District undertakes to, and does in fact, deliver the property sold to a resident of the District to a place outside the District and the property sold is returned by the purchaser to the District, the purchaser is liable for a use tax on the purchase price of such property.

* * *

SUMMARY OF ARGUMENT

Contrary to the contentions of the District of Columbia, the respondent submits that there was more than sufficient evidence to justify the Tax Court's conclusion that the production of motion pictures is a "personal service" transaction and, therefore, exempt from the sales tax. Moreover, in view of the limited scope of review in cases of this nature, the decision of the Tax Court must stand unless "clearly erroneous".

The petitioner's challenge of the Tax Court's denial of the motion to revise findings of fact, to vacate the decision and for entry of decision in favor of the District, is invalid as these motions in effect sought no relief from the Court below, except to substitute the District's view of the case for that of the Court.

The decision of the Tax Court should further be sustained since the tax was invalid in that it was imposed on a transaction in interstate commerce. This point was raised before the Tax Court but not decided by it.

ARGUMENT

I.

The principal question in this case concerns the applicability of a certain exemption from the District of Columbia sales tax law to the production of motion pictures. The statute, Section 47-2601-14(b)(3) removes certain transactions from the definition of "retail sale" if they are of a "personal service" nature and involve sales as

"inconsequential elements". The regulations adopted by the Commissioners of the District of Columbia, pursuant to authority granted to them, define "inconsequential elements" to "include" those cases in which the sales price of tangible property is less than 10% of the amount charged for the services (Section 202(b), D. C. Sales Tax Regulations), (J. A. 7).

Based upon all of the evidence before it, the Tax Court concluded that the work performed by the respondent was indeed of a "personal service" character and that the sales price of tangible property supplied was less than 10% of the total amount charged. Accordingly, it held the assessment to have been illegally made.

The findings of fact of the Tax Court are so detailed and complete (J. A. 82-88) that little purpose would be served by a further review of the evidence. It is sufficient to say that a reading of the record in this case can leave no doubt of the overwhelming evidence to support the finding that the respondent performed a personal service. It is not disputed that in order to produce the end result, namely the completed films, the respondent had to employ the skills of many different persons. In most instances, the services required a high degree of both professional and technical training. The labor union who contracted for the films did little except to furnish an idea to the producer and left it to the respondent to create the means of conveying it. Among the skills required to produce these films were those of writers, producers, cameramen, narrators and editors, each one contributing his own specialized training and experience to the desired result—in this case to depict the trade or occupation in which the union was interested. Ingenuity, training and skill were the only attributes these persons brought to the project. The tangible materials with which they worked were wholly incidental and highly insignificant to the ultimate goal. The only element of the production process which is not ultimately consumed and discarded is the film upon which

all the skill and labor has been represented and which is the material thing by which the ideas are transmitted to the public. To be sure, it is vital to the motion picture production that it can be cast in permanent form on a piece of film, but that gives the piece of film no intrinsic value as a tangible object, any more than the paper on which a legal document is typed or printed has a value apart from its original cost. We think that the rule was correctly expressed by the Supreme Court of Illinois in *J. A. Burgess & Co. v. Ames*, 359 Ill. 427, 194 N. E. 565, when that court said:

“We can perceive no logical difference between the paper upon which a photostatic copy of something is made or a blueprint produced, and that paper which a lawyer uses for writing a will or deed, a doctor for writing a prescription, or an abstracter for showing a chain of title. The paper is a mere incident; the skilled service is that which is required.”

See also: *Adair Printing Co. v. Ames*, 364 Ill. 342, 4 N. E. 2d 481; *Wallender-Dedman Co. v. Department of Revenue*, 15 Ill. 2nd 485, 155 N. E. 2d 574; *United Aircraft Corp v. O'Connor*, 141 Conn. 530, 107 Atl. 2d 398.

While the question of the exemption of motion picture production has not been previously before this Court, a strikingly similar factual situation was presented in *Washington Times-Herald, Inc. v. District of Columbia*, 94 U.S. App. D. C. 154, 213 F. 2d 23. In that case, the Court in an en banc decision held that the transfer of mats to a newspaper for the purpose of reproducing comic strips, involved an inconsequential amount of tangible property. This ruling was re-affirmed in *District of Columbia v. Washington Post Co.*, 98 U.S. App. D. C. 304, 235 F. 2d 531. We submit that the reproduction of artistic skills by means of a film strip is no different from an artist's conception engraved on a piece of metal. The petitioner seeks to distinguish these cases from the instant facts on the grounds that in the newspaper cases, the comic

strips were produced by a single artist whereas the respondent utilized the services of many different persons. This distinction is supposedly founded on the theory that the words "personal service" denote the activities of only one person and consequently the exemption could not apply where more than one individual is involved. The words "personal service" must be understood in the context of the particular statute in which they are used. In income tax laws, the words often refer to services of the taxpayer, rather than those of other persons or employees. This was the case in *District of Columbia v. Ghent*, 95 U.S. App. D. C. 103, 220 F. 2d 210 referred to by the petitioner, which dealt with the exemption of persons from the unincorporated franchise tax when more than 80% of the gross income is produced by services actually performed by the owner or partners. See also *District of Columbia v. Jones*, 106 U.S. App. D. C. 191, 271 Fed. 2d 457. It is apparent that in those cases, totally different principles are involved. The statute there (Sect. 47-1574, D. C. Code (1961)) is concerned with exempting only services of the owners of the business. No such purpose is expressed or implied in the sales tax law. The exemption here provided goes to the *nature* of the service preformed, not to the number of persons who may have participated. Does the District suggest that if two artists had collaborated in producing the comic strips in *Washington Times-Herald, Inc.*, *supra*, this Court would have ruled otherwise? We submit that such a theory is as strange as it would be to say that a person who consults a large law firm for an opinion and receives the composite conclusion of many of its members—none of whom may be partners—has obtained anything other than a personal service. If it had been the design of Congress to so limit the exemption as is contended by the petitioner, it could have easily chosen language as precise as Section 47-1574 of the Code. It should also be noted that there is a distinct difference between the concept of "personal service" as used in a sales tax act and when

applied in the context of a special statute dealing with the recovery of attorneys' fees, as in *VanZandt v. Fort Worth Press*, 359 S. W. 2d 893 (Tex. 1962) and *Burke v. Merrill Lynch, Fenner & Smith, Inc.*, 363 S. W. 2d 392 (Tex. 1962), both relied on by the petitioner. Those rulings make it plain that the statute there involved is "penal" in nature and, therefore, "personal service" should be given a strict construction. While recognizing that tax exemptions are likewise strictly construed, there is no occasion for dealing with problems of statutory construction when, as here, the exemption is unambiguous. If the exemption is reasonable and the statutory intent is plain, there is no need to call on any aid in construction. *American Bridge Co. v. Smith*, 352 Mo. 616, 179 S. W. 2d 12, cert. den. 323 U.S. 712, 65 S. Ct. 37, 89 L. Ed. 573. It is significant, we believe that the Congress in Section 47-2601-14(b)(3) did not limit the exemption to "professional services" but included "personal service" transactions generally. The use of both terms in the same exemption provision certainly does not suggest the desire for a limiting interpretation. We also find it meaningful that the court in *VanZandt v. Fort Worth Press, supra*, took pains to clarify its concept of "personal service" when it said:

"... We are not to be understood as holding that services will lose their character as personal services within the meaning of Article 2226 because in the performance of the services the claimant uses the materials, implements, tools or equipment essential to the service. To perform personal services the lawyer must use his books, the doctor his diagnostic or surgical instruments, the carpenter his tools" (359 S. W. 2d 896).

The petitioner further questions the ruling of the Tax Court that the transactions were exempt as involving sales as "inconsequential" elements as this term is defined in the regulations. The Commissioners apparently recognized that the term "inconsequential" as used in the statute had

an element of vagueness and required clarification. They elected to define it to mean "less than 10% of the amount charged". The petitioner urges reversal of the Tax Court mainly on the basis of the fact that appreciably more than 10% of the amount charged the AFL-CIO was paid to Capital Film Laboratories. Further, it urges that there was no direct evidence of the cost of the tangible items supplied to the union and that sales price rather than "cost" or "value" should be used to determine whether the exemption applies. From there, the petitioner's argument proceeds to the assertion that if "value" is used as the measure of quantity, then it must contain the total laboratory cost involved in carrying out the development process. It must be apparent that this entire reasoning is based on the premise that the release print is a physical object which has been manufactured rather than a piece of material which contains the end product of the services of many individuals. The evidence before the Tax Court showed that the value of the raw film is in no way enhanced by the production process. As a physical object, it has no greater value after the production is completed than it had in its original state. If the union had wanted to purchase raw film, it presumably could have done so at the same price that such film was sold to the respondent or its laboratory. However, the AFL-CIO was contracting for the production of motion pictures, not for the purchase of films. As was said by the Tax Court in its opinion: (J. A. 89)

"... the term 'inconsequential elements' was to be considered relative or comparative, and was to be determined by consideration of the cost or value of the tangible personal property in its blank or undeveloped state in relation to, or compared with the amount received for the personal services."

We submit that the evidence strongly supports the correctness of the Tax Court's view in its interpretation of the aforementioned regulation.

II.

The petitioner takes exception to the denial by the Tax Court of its motions to amend the findings of fact and for entry of decision in its favor. An examination of the record shows that the motions referred to, with minor exceptions, if granted, would have simply substituted the District's view of the case for that of the Tax Court. In this respect, the motions presented the same basic arguments discussed in the preceding section of this brief, i.e. the transaction was not of a "personal service" nature and the tangible property, represented more than 10% of the sales price. Of course, if the Tax Court had found this version of the facts to be true, it would of necessity have decided the case in favor of the District.

In effect, the District now asks this Court to review the findings of fact once more. The scope of review with respect to decisions of the District of Columbia Tax Court is limited by statute to the same extent as in cases tried without a jury in the United States District Court (Section 47-2404, D. C. Code (1961)). This provision is almost identical with the statutory jurisdiction of Federal appellate Courts in reviewing decisions of the Tax Court of the United States. (Section 7482(a) of the Internal Revenue Code, Sect. 7482(a), Title 26, U. S. C.). The Supreme Court has held that in tax cases, the findings of the trial court are entitled to the same respect as findings of District Courts in accordance with Rule of 52(a) of the Federal Rules of Civil Procedure. Accordingly, unless clearly erroneous, such findings may not be set aside. *Commissioner v. Duberstein*, 363 U.S. 276, 80 S. Ct. 1190, 4 L. Ed. 2nd, 1218. Nor may an appellate court in tax cases "weigh the evidence, draw inferences from it and declare the result". *Helvering v. National Grocery Co.*, 304 U.S. 282, 58 S. Ct. 932, 82 L. Ed. 1346; *Young v. Commissioner of Internal Revenue* (9th Cir.) 268 F. 2d 89.

For all of these reasons, we submit that the Tax Court's denial of petitioner's motions should not be disturbed.

III.

An alternative ground on which the taxpayer attacked the assessment of sales taxes in this case, was the contention that the tax imposed was an unreasonable burden on interstate commerce. This point was raised in the Tax Court (J. A. 2) but not decided by that Court. Apparently, the Tax Court refrained from deciding this issue because of its uncertainty that it can rule on constitutional questions. See the Tax Court's opinion in *General Motors Corporation v. District of Columbia*, Docket Nos. 1698 and 1699, decided January 29, 1962.

Section 47-2605(m), D. C. Code (1961) specifically exempts those sales from sales and use tax which a state would be without power to tax under the Constitution of the United States. Accordingly, the inhibition imposed on a state's power to tax by reason of Article I, Section 8 of the Constitution is made expressly applicable to the District for purposes of this tax.

Section 401(l) of the District of Columbia sales tax regulations describes the transactions which are deemed to be included in this exemption and those which are considered as outside of its scope. Generally, it is accurate to say that when a sale is consummated in the District, the tax may be imposed although the goods are intended for use in interstate commerce. However, the regulation makes it clear that when the vendor is obligated to and does in fact deliver the goods outside the District, the transaction is one in interstate commerce and the tax does not apply.

There can be no doubt that a sales tax imposed on a sale in interstate commerce is an example of the kind of unreasonable burden that the Constitution prohibits. *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274, 91 L. Ed. 265. Therefore, the only remaining question in this case is whether the facts establish an interstate sale.

The evidence adduced leaves no doubt that the respondent was required to and did in fact deliver the films outside the District of Columbia. They were usually shipped by parcel post, but it was understood by all concerned that the respondent's obligation was not discharged until the films reached their intended destination. No use in the District of Columbia was contemplated and none took place. The AFL-CIO supplied the respondent with detailed instructions as to where the films were to be sent. Admittedly, the films were returned to the respondent and re-distributed to other destinations outside of the District. In our view, this did not change the basic nature of the transactions. The temporary storage of the films in the District pending further shipment was completely incidental to the primary purpose of showing the films outside the District. The element of "retention" required for true storage to exist did not come into being. *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S. Ct. 389, 83 L. Ed. 586. We recognize that the same sales tax regulation that exempts sales to points outside of the District, also provides:

"Where a registered vendor in the District undertakes to, and does in fact, deliver the property sold to a resident of the District to a place outside the District and the property sold is returned by the purchaser to the District, the purchaser is liable for a use tax on the purchase price of such property."

It follows from this that if the assessing authority regards the transaction as taxable by reason of the return of the films for storage, the proper course would have been the assessment of a use tax on the purchaser and not that of a sales tax on the seller.

There can be no doubt that under the law of sales, title to the films did not pass until delivery had been made at the point designated by the union. As stated in the Uniform Sales Act, Section 28-1203 D. C. Code (1961),

Rule 5, where the seller is required to deliver the goods to the buyer *or* at a particular place, title does not pass until such delivery has been effected.

By all appropriate legal standards, therefore, the sale was one in interstate commerce. Unlike an income tax law, a sales tax statute does not attempt to impose a levy at the place where the goods are produced or the sale is negotiated, but rather it seeks to reach the situs of actual use. In the present case, assuming the existence of a comparable law, and the absence of specific exemptions, there is no question that each state in which the films were shown would be entitled to impose a use tax. It is this "vice" of potential double tax of which the Supreme Court, although in a somewhat different context, spoke in *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 82 L. Ed. 1365, 58 S. Ct. 913.

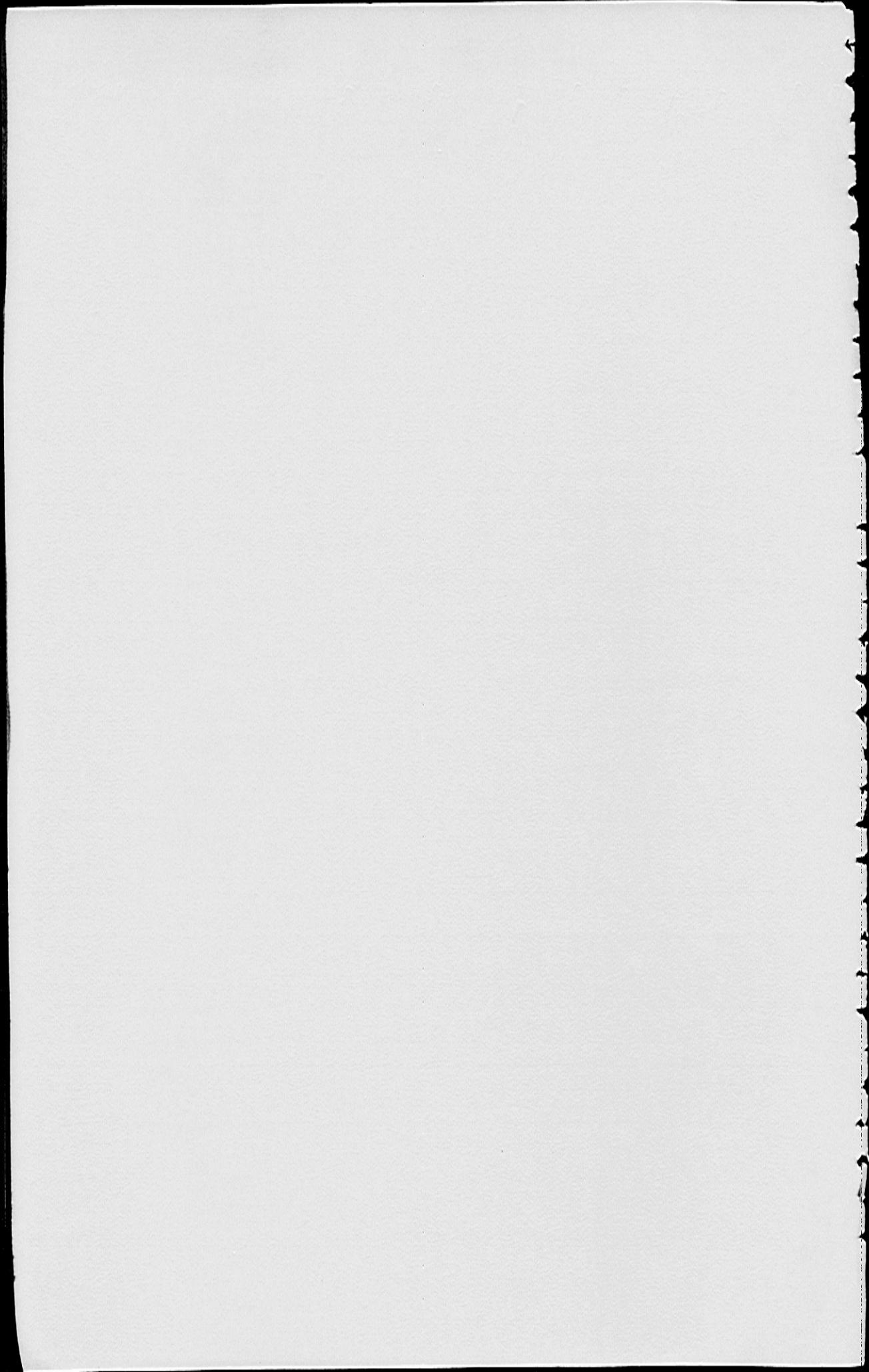
We submit that on these alternative grounds the decision of the Tax Court should be sustained.

CONCLUSION

For all of the foregoing reasons, the decision of the District of Columbia Tax Court should in all respects be affirmed.

Respectfully submitted,

NATHAN SINROD
WERNER STRUPP
Attorneys for Respondent



PETITION FOR REHEARING EN BANC, OR
IN THE ALTERNATIVE, FOR MODIFICATION OF JUDGMENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,237

DISTRICT OF COLUMBIA,

Petitioner,

v.

NORWOOD STUDIOS, INC.,

Respondent

ON PETITION FOR REVIEW OF A DECISION OF
THE DISTRICT OF COLUMBIA TAX COURT

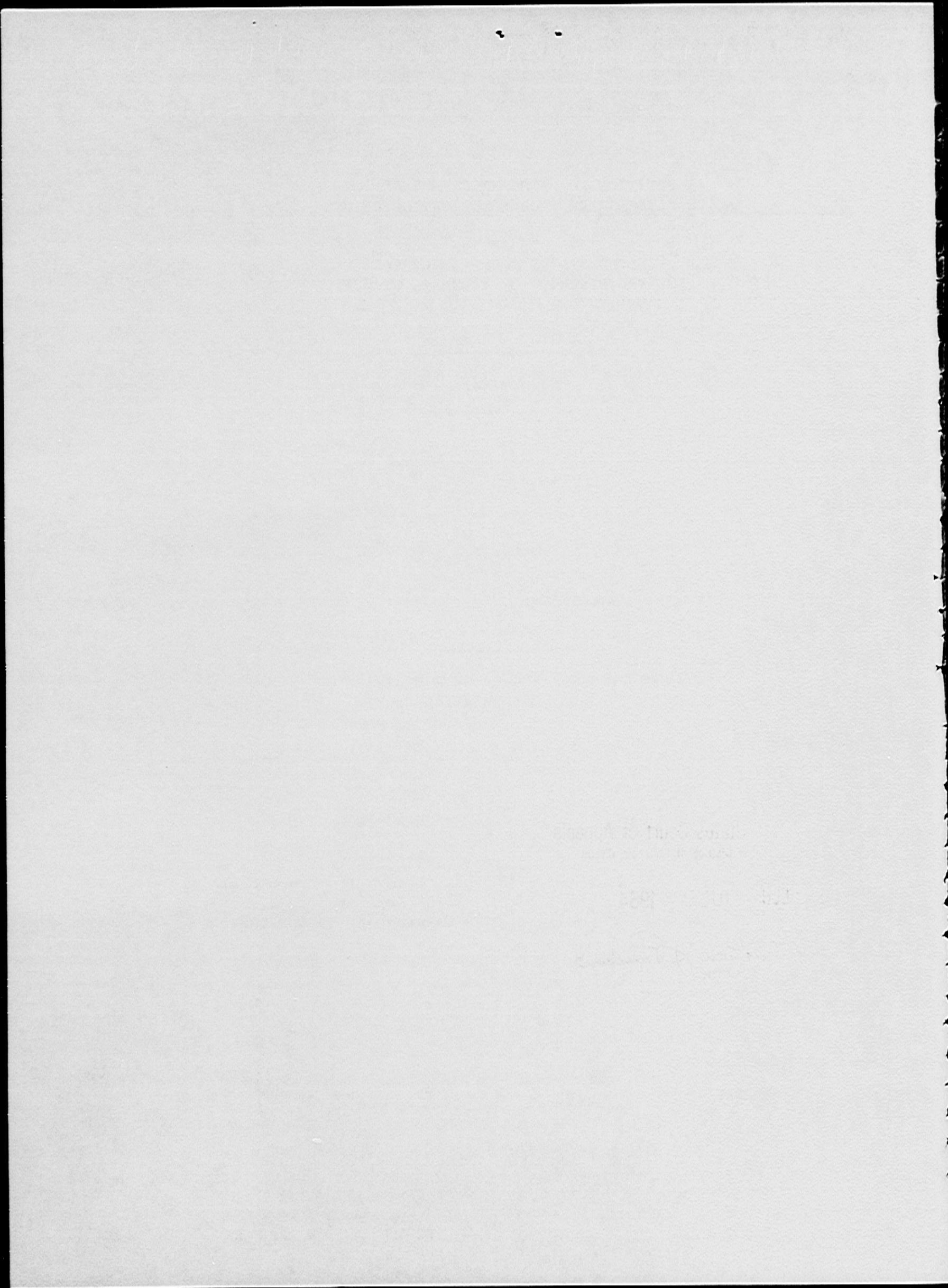
United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 9 1964

NATHAN SINROD

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Washington, D. C. 20036

Nathan J. Paulson
CLERK



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

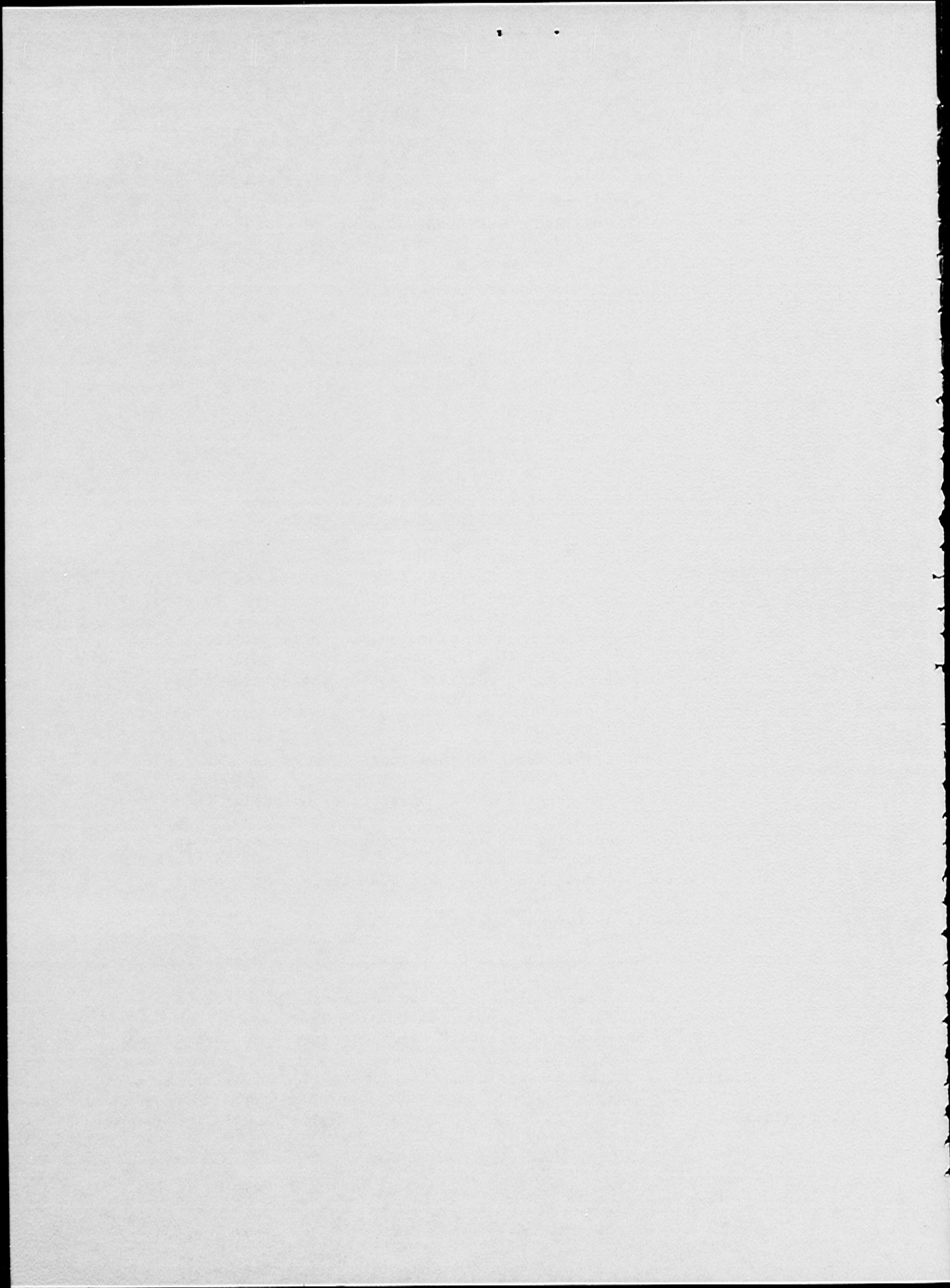
DISTRICT OF COLUMBIA,)
Petitioner)
v.) No. 18,237
NORWOOD STUDIOS, INC.,)
Respondent)

PETITION FOR REHEARING EN BANC, OR
IN THE ALTERNATIVE, FOR MODIFICATION OF JUDGMENT

I

Pursuant to the provisions of Rule 26 of the General Rules of this Court, respondent Norwood Studios, Inc. respectfully petitions the Court for a rehearing of the above-entitled case by the entire Court sitting en banc.

The opinion of a division of this Court, handed down on June 26, 1964, reversed a decision of the District of Columbia Tax Court. That Court had held invalid an assessment of a deficiency in sales tax in the total amount of \$14,714.82. The assessment arose from the production of motion pictures by the respondent for the AFL-CIO. The respondent contended, and the Tax Court held, that the transactions were in the nature of a "personal service" in which tangible personal property was an "inconsequential element", and hence the same were exempt from the District of Columbia sales tax. Section 47-2601-14(b)(3), D. C. Code (1961).

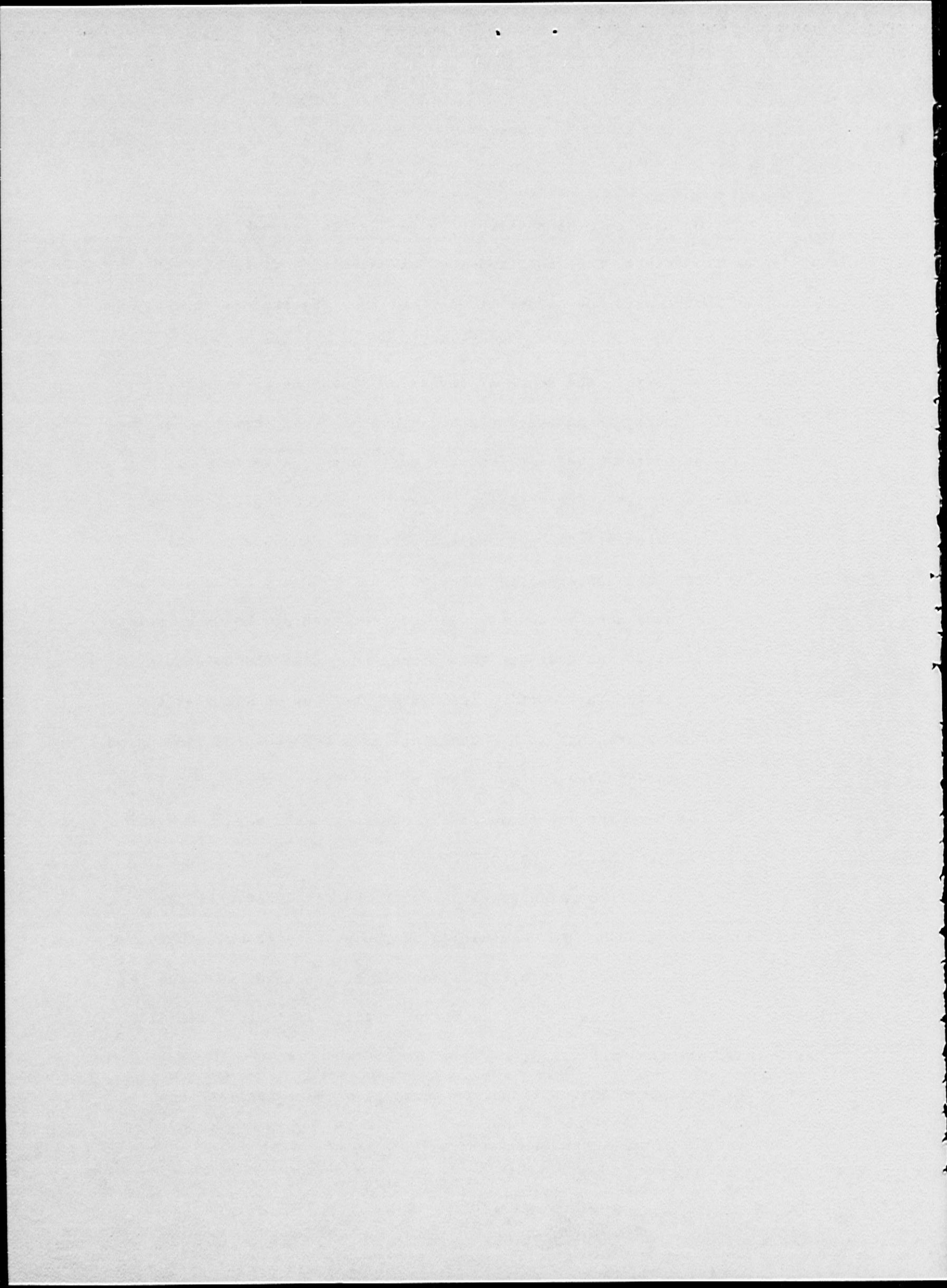


The opinion of Senior Circuit Judge Edgerton, speaking for the division of this Court, does not find the Tax Court's findings of fact unsupported by the evidence before it, nor are they rejected as "clearly erroneous". In the absence of such plain error, as was pointed out in Section II of our brief, the scope of review of decisions of the District of Columbia Tax Court, is no broader than in appeals from decisions of the Tax Court of the United States or from the decisions of a variety of administrative agencies. Accordingly, since the Tax Court had found as a fact that the requirements of "personal service" and "inconsequential element" had been met, there was no occasion for this Court to substitute its judgment on these purely factual questions for that of the Court below.

Assuming, for purposes of this discussion, that the opinion impliedly overturns the Tax Court's findings of fact, we submit that the conclusion reached represents such a departure from the accepted meaning of the statute, regulations and the decisions of this Court, that not only the interests of this taxpayer but those of the public generally will benefit from a review of this case by the full Court.

The division's opinion concludes with the statement that the transactions were "sales". An examination of the statute reveals that the exemption of Section 47-2601-14(b)(3) is not limited to cases in which there is no sale, for it says that the "term 'retail sale' and 'sale at retail' shall not include

Professional, insurance, or personal service transactions



which involve sales as inconsequential elements" (Emphasis added). (J. A. 6).

Even more plainly, Section 202(b) of the Sales Tax Regulations states in part:

"The phrase 'sales as inconsequential elements' shall be deemed to include any sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the sales price of the tangible personal property is less than 10% of the amount charged for the services required in the transaction." (Emphasis added). (J. A. 7).

We submit, therefore, that it is not the question whether the end-product of the transaction involves a "sale" in a technical sense. What must be determined is the essential characteristics of the vendor's performance in accordance with its engagement. That was the approach used by this Court in Washington-Times Herald v. District of Columbia, 94 U. S. App. D. C. 154, 213 F.2d 23. In that case, decided en banc in 1954, there was no question that the transfer of mats involved a "sale", but the amount of tangible property was there found to be inconsequential in relation to the total value of the services. In the present case, the only tangible object delivered to the purchaser was the film itself which was the result of the artistic and professional services performed by the many persons who participated in the production. The pieces of celluloid here were inherently of insignificant value, just as the zinc mats

containing comic strips in the Times-Herald case were essentially valueless. The division found it significant that the newspaper acquired the right to reproduce the comic strip "one time" whereas in the instant case the producer "retained no interest in them and imposed no restriction on their use" (page 3 of the slip opinion). We respectfully submit that this Court placed no reliance on that fact in Washington Times-Herald, supra. We believe it to be important to quote the pertinent portion of the opinion:

"The Tax Court found as a fact that 'The Value and sales price of the matrices (also known as mats) were less than ten per cent of the amount charged for the services rendered the petitioner under the contracts (with the syndicates)'.

This finding, which was disregarded by the Tax Court in its decision holding the transaction taxable, was a sufficient basis for reaching the opposite conclusion. The syndicates sold to the Times-Herald the right to reproduce one time the work of artists who make the drawings. They simply sold the professional and personal services of the artists whom they had under contract and in so doing transferred title to the mats, of inconsequential value, from which the drawings could be reproduced. The price was paid for the artist's work, i.e. for the right to reproduce the impressions on the mats, -- not for the mats themselves. The newspaper bought the creation of the artist -- not the material on which it was impressed -- and the right to reproduce it. Without that right, the comic strip mats would be entirely worthless."

(213 F.2d 24)

We find no suggestion in this language that the retention of rights or restriction on use are considered significant. Were it otherwise, it could be argued hypothetically that the transfer of all of the artist's rights in the comic strips and the lack of any restriction of use alone would have made the transaction taxable. Surely, the fact that more or

greater rights were transferred cannot affect the basic nature of that which was done.

The opinion of this Court refers to decisions in other states which have sustained sales taxes in cases of sales of printed matter. We submit that the evidence before the Tax Court demonstrated the high degree of professional, technical and artistic skill required for the production of motion pictures. Whatever the evidence may have been in other cases, we submit that as a general proposition it cannot be doubted that the creation of films in their entirety necessitates a far greater degree of professional training and artistic competence than the production of printed materials. Moreover, it does not appear that either the California or New York law, involved in the two cited cases, contained specific provisions which exempt from the tax personal service transactions where the amount of tangible property is inconsequential.

II

Norwood Studios, Inc., in its petition in the Tax Court, challenged the assessment on the alternate ground that the sales were in interstate commerce and, therefore, exempt from the tax by the Constitution of the United States and by Section 47-2605(m), D. C. Code (1961); the petition further relied on Section 401(1) of the Sales Tax regulations which contains a detailed definition of interstate sales. The Tax Court did not decide this question although extensive evidence was offered at

the trial. The issue was again argued in this Court and a section of our brief was devoted to it. The petitioner, neither in its brief nor in oral argument, addressed itself to the point. The division's opinion makes no mention of it. We submit that the question is a highly important one and that it should be fully considered on this appeal. This is especially so since the evidence below was uncontroverted in establishing that the respondent was obligated to deliver the film outside of the District of Columbia and that the actual use likewise took place outside the District.

For the foregoing reasons, it is respectfully submitted that this case should be reviewed by the entire Court sitting en banc.

III

It was pointed out in our brief that the Tax Court's silence on the interstate commerce issue may be attributable to that Court's doubt of its power to decide constitutional questions. Whether this was the Tax Court's reason, or whether it believed that its disposition of the case on other grounds made a decision unnecessary, is perhaps unimportant at this time. What is significant is that the issue remains completely unresolved. The statute establishing the Tax Court, Section 47-2403 D. C. Code (1961) calls upon it to "hear and determine all questions arising on said appeal" and to "make separate findings and

conclusions of law". The question raised is only indirectly a constitutional one as the District of Columbia has promulgated a regulation dealing with this subject. It was clearly within the Tax Court's power to apply that regulation to the facts in evidence and to enter its decision accordingly.

Only one finding of fact, finding No. 4 (J. A. 85), bears on the interstate question. The Court there found that the films were delivered to various establishments throughout the United States. Whether additional findings are necessary to enable the Tax Court to reach a conclusion on this issue, ought in the first instance be determined by that Court.

For the reasons herein stated, and in the event that the petition for rehearing en banc should be denied, the respondent submits that this case should be remanded to the District of Columbia Tax Court for the purpose of determining whether the sales involved are exempt as interstate transactions.

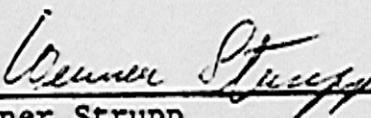
Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Werner Strupp, attorney for respondent, in the above-entitled case hereby certify that the foregoing petition is presented in good faith and not for delay.



Werner Strupp

**OPPOSITION TO PETITION OF RESPONDENT FOR
REHEARING EN BANC, OR IN THE ALTERNATIVE,
FOR MODIFICATION OF JUDGMENT**

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DISTRICT OF COLUMBIA,)
Petitioner,)
v.) No. 18, 237
NORWOOD STUDIOS, INC.,)
Respondent.)

**ON PETITION FOR REVIEW OF A DECISION
OF THE DISTRICT OF COLUMBIA TAX COURT**

CHESTER H. GRAY
Corporation Counsel, D.C.

MILTON D. KORMAN
Principal Assistant Corporation
Counsel, D.C.

United States Court of Appeals
for the District of Columbia Circuit

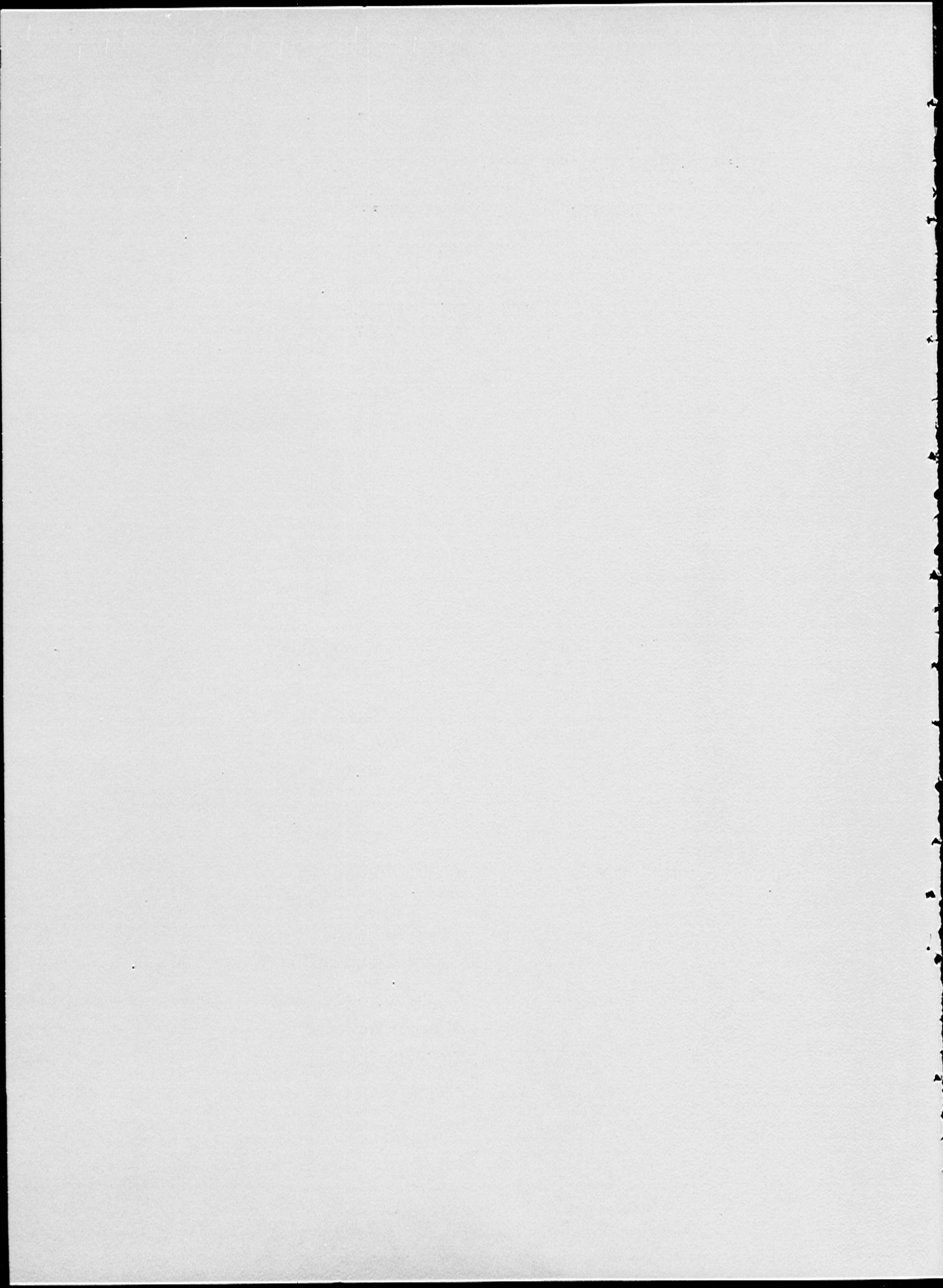
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,)
Petitioner,)
v.) No. 18, 237
NORWOOD STUDIOS, INC.,)
Respondent.)

OPPOSITION TO PETITION OF RESPONDENT FOR
REHEARING EN BANC, OR IN THE ALTERNATIVE,
FOR MODIFICATION OF JUDGMENT

For the reasons set forth below, the District of Columbia opposes the granting of the petition of respondent, Norwood Studios, Inc., for a rehearing en banc, or in the alternative, for modification of judgment. Basically, respondent asks, with its alternative requests, that the issues previously decided by this Court be completely reconsidered and redetermined notwithstanding that the entire matter has been fully presented by respondent both before the District of Columbia Tax Court and a division of this Court.

I

Rehearing En Banc

Respondent asserts that "since the Tax Court had found as a fact that the requirements of 'personal service' and 'inconsequential elements' had been met, there was no occasion for this Court to

substitute its judgment on these purely factual questions for that of the Court below." The issue of whether the transactions were personal service transactions within the purview of D.C. Code § 47-2601-14(b) (3) (1961) was not a purely factual question but rather an issue which called for a legal conclusion based on all the evidence in the record. This Court's conclusion that the "production and transfer of printed material and the like is not a personal service but a sale" was proper and should stand. The transactions were retail sales which represented the "production, fabrication, or printing of tangible personal property on special order for a consideration." D.C. Code § 47-2601-14(a)(2).

Respondent further asserts that this Court was in error in not concluding that the sales in question were interstate sales and thus not subject to District tax. Respondent, on appeal, accepted the decision of the Tax Court in its favor which held that the transactions in question were personal service transactions. Alternatively, respondent argued fully in its brief the contention that, in any event, the decision of the Tax Court should be sustained on the ground that the sales by respondent were made in interstate commerce (Respondent's Brief, pp. 12-14). Thus, respondent seeks the opportunity to argue once again before this Court a contention fully considered by the division of the Court and rejected by it. The record clearly substantiates the conclusion that the sales were local sales and this Court's holding that they were

subject to District sales tax is, of course, a rejection of respondent's argument that these same sales were exempt from tax because they were made in interstate commerce.

II

Modification of Judgment

Respondent contends, in the alternative, that "this case should be remanded to the District of Columbia Tax Court for the purpose of determining whether the sales involved are exempt as interstate transactions."

In its petition filed in the District of Columbia Tax Court, respondent specifically contended that the assessments of sales taxes against it represented "an unreasonable burden on interstate commerce, prohibited by the Constitution of the United States and by Section 47-2605(m), D.C. Code (1961 Ed.), and as defined in Section 401 (1) of the Sales Tax regulations." (J.A. 2.) The Tax Court therefore had before it and considered the contention which respondent asserts has not been determined by that Court. To the contrary, the Tax Court, although holding in favor of respondent, clearly concluded that the argument of respondent that its sales were made in interstate commerce was without merit, as did this Court when, on appeal, it found the sales to be local sales subject to District sales tax.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of respondent, Norwood Studios, Inc., for rehearing en banc, or in the alternative, for modification of judgment should be denied.

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